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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS HANDED DOWN NOVEMBER 30, 1880,
TO THE DECISIONS OF FEBRUARY 1, 1881.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,

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JUDGES OF THE COURT OF APPEALS.

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CHARLES ANDREWS,
THEODORE MILLER,
ROBERT EARL,
GEORGE F. DANFORTH,
FRANCIS M. FINCH,

Associate Judges.

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CASES DECIDED

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La Fayette Ranney, Appellant, *v.* Siegmund M. Peyser et al., Respondents.

In an action to foreclose a mortgage upon a leasehold interest, plaintiff was, upon his own motion and by consent, appointed receiver of the rents and profits of the mortgaged premises, with power to keep the buildings insured and in repair, and "to pay the ground-rent and taxes." Subsequently M., the holder of prior mortgages, foreclosed, and upon sale the premises were bought in by M. for a sum less than his mortgages. Plaintiff, out of the rents collected by him as receiver, paid the ground rent from the time of his appointment to the time of sale; also for some repairs, and to M. a sum for interest on his mortgages. Upon settlement of his accounts as receiver plaintiff was required to pay over the balance in his hands in payment of taxes. *Held* error; that the appointment of plaintiff as receiver was for his benefit; not for the benefit of M., who might have applied for a receivership in his own suit, which would have superseded the rights of the plaintiff; that the terms of the order appointing plaintiff, as to the rents and taxes, were permissive, not mandatory; and plaintiff having, by diligence, acquired a specific lien upon the rents superior to the equities of M., was entitled to retain them to apply on his mortgage.

Ranney v. *Peyser* (20 Hun, 11), reversed.

Appeal from order of the General Term of the Supreme Court, in the first judicial department, made February 6, 1880,

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Appeal from order of the General Term of the Supreme Court, in the first judicial department, made February 6, 1880,

reversing an order of Special Term, which confirmed the report of a referee appointed to pass the accounts of plaintiff as receiver, and awarded the funds in his hands to himself as plaintiff. (Reported below, 20 Hun, 11.)

On or about October 3, 1877, the plaintiff commenced this action to foreclose a mortgage executed to him by the defendants, Peyser and wife, upon a leasehold interest in two lots of land in the city of New York.

On the 26th day of December, 1877, upon the consent in writing of the defendant Peyser and his attorney, and upon application of the plaintiff, an order was entered appointing plaintiff receiver of the rents, issues and profits of the mortgaged premises, which order contained the following provisions, viz.: "That as such receiver he (plaintiff) have power, which is hereby given to him, to rent and manage said buildings and premises, and to rent the same or any part thereof from time to time for terms not exceeding one year, to collect and receive the rents thereof, and out of the same to keep said buildings insured against loss or damage by fire and in repair, and to pay the ground rent and taxes," etc.

In pursuance of this order the plaintiff collected the rents of the premises from January to October, 1878. On November 18, 1878, upon plaintiff's application, an order was made at Special Term, referring it to a referee to take and pass the accounts of the plaintiff as receiver, reserving the question as to the disposition of the money in his hands until the coming of the referee's report. The plaintiff, as receiver, accounted before the referee, and his account was passed and allowed, showing a balance in the hands of the plaintiff of $589.05, allowing him $100 credited as payment for counsel fees. Exceptions were taken to the referee's report; plaintiff made a motion to confirm the report, and for an order permitting him to apply the balance in his hands to the payment of the amount due him upon his bond and mortgage. The motion was opposed by the defendants, and by Adolphus H. Maas, who presented to the court a petition and a notice of motion, asking that the

Statement of case.

plaintiff be required to pay the balance of the moneys in his hands as receiver to the petitioner.

Said petition showed the following facts: Maas, being the owner of two mortgages upon the premises, which were liens prior to that of the plaintiff, on the 1st day of March, 1878, commenced actions to foreclose the same. On the 8th day of October, 1878, a decree of foreclosure and sale was duly entered in said actions. On October 31, 1878, Maas became the purchaser of the premises at a referee's sale under the decrees, at a sum less than the amount due to him. At that time the ground rent for the quarter ending October 31, 1878, amounting to the sum of $105, and the taxes for the year 1876 ($448), for the year 1877 ($424), and for the year 1878 ($408), had not been paid. Whereupon Maas applied to plaintiff, requesting him to apply the moneys in his hands, as receiver, toward the payment of said ground rent and taxes, which plaintiff refused to do. Afterwards Maas paid the ground rent and the taxes for 1876 and 1878.

The order of General Term reversed the order of Special Term, sustained an exception to the allowance of the $100 counsel fees, charged plaintiff with the balance as found by the referee adding said sum, required plaintiff to pay the taxes for the year 1877, with interest, and the fees of the referee, and to pay over the balance, with interest on the whole sum from January 31, 1879, to Maas or his attorney.

Samuel Untermyer for appellant. A junior mortgagee who commences an action for the foreclosure of his mortgage, and in that action, upon his own motion, and at his expense, procures the appointment of a receiver of the rents, thus sequestrates the rents, and is entitled to the benefit of his superior diligence over his senior mortgagee. (*Howell* v. *Ripley*, 10 Paige, 43; *Post* v. *Doo*, 4 Edw. Ch. 412; *Washington Life Ins. Co.* v. *Fleischauer*, 10 Hun, 117; *Bank of Ogdensburg* v. *Arnold*, 5 Paige, 38.) Even a receiver of the property of a judgment debtor is not vested with any title to the real estate, owned by the judgment debtor, nor does a purchaser from such

a receiver acquire any interest therein. (*Scott* v. *Elmore*, 10 Hun, 68; *Chautauqua Bank* v. *Risley*, 19 N. Y. 369; *Foster* v. *Townshend*, 68 id. 203.) One who purchases property subject to a mortgage, which forms part of the consideration of his purchase, is estopped from contesting the validity of the mortgage, for the reason that he purchased a mere equity in the premises over and above the amount of the mortgage. (*Hartley* v. *Harrison*, 24 N. Y. 170.)

M. L. Townsend for respondents. The order of the court appointing the plaintiff receiver was a mere confirmation of the defendant's consent, and plaintiff should, therefore, be treated in equity as a mortgagee of a lease in possession. (*Astor* v. *Hoyt*, 5 Wend. 603.) The principle upon which the courts appoint a receiver for the benefit of a junior incumbrancer, and give him the benefit thereof, as against a prior incumbrancer of the mortgagor, is because of the insolvency of the mortgagor and the inadequacy of the security to pay the mortgage debt; which facts must be stated in the application. (*Post* v. *Dow*, 4 Edw. Ch. 412, 413.) The equitable doctrine of subrogation should be applied, as it has been applied by this court. (*Cole* v. *Malcolm*, 66 N. Y. 366; *Cottrell's Appeal*, 23 Penn. St. 294; *Lidderdale's Exrs.* v. *Robinson's Admr.*, 2 Brockenbrough, 159.)

RAPALLO, J. The plaintiff procured the receivership of the rents of the mortgaged premises for his own benefit, as junior mortgagee. He did not obtain it for the benefit of Maas, the prior mortgagee, who was not a party to the proceeding, nor even to plaintiff's foreclosure suit, and had nothing to do with the receivership. If the plaintiff had not obtained it the rents would have gone into the hands of Peyser, the mortgagor. Maas, if he deemed the mortgaged premises an insufficient security, had the right, on the foreclosure of his mortgage, to apply for a receivership of the rents for his own benefit, and this would have superseded the rights of the plaintiff, as to subsequently accruing rents, as the mortgages held by Maas

were prior to that held by the plaintiff. But until Maas took that step he had no right to the rents. Peyser could lawfully have collected them and retained them, or paid them to the plaintiff on account of his mortgage, or the plaintiff could, as he did, obtain a receivership of them for his own benefit, and Maas was in no way entitled to avail himself of, or rely upon, the plaintiff's proceeding. So long as Maas neglected to take any legal measures on his own behalf to secure the rents, he had no concern with them or the application of them.

The court at Special Term took this view, but the order made at General Term and now appealed from gives to Maas all the benefit of the receivership obtained by the plaintiff, and in addition compels the plaintiff even to lose his commissions as receiver. The balance in his hands as receiver, exclusive of commissions, as appears from his account as passed by the referee, was $589.05. To this the order of the General Term adds $100 by disallowing a credit of that amount for a fee paid by the plaintiff to his counsel, making the balance $689.05, as of the date of the referee's report. It charges him with interest on that balance, and disallows any commissions as receiver, and directs him to pay out of the sum thus found due, the fees of the referee, the taxes of 1877, with the interest thereon, and to pay over the remainder of the fund, and interest thereon, to Maas. The plaintiff's mortgage has been cut off by a sale under the prior mortgages of Maas, which resulted in a deficiency, and his diligence in endeavoring to save something out of the rents to apply on his mortgage has been punished by compelling him to apply all he collected to the benefit of Maas, and bear his own expenses.

This result is owing to the construction put by the General Term upon the order appointing the plaintiff receiver. It was there held that he was directed by that order to apply the rents to the payment of the ground rent and taxes. That this direction was for the benefit of Maas or the mortgagor, and that it was misconduct on the part of the plaintiff not to apply the rents as thus directed. We do not concur in this construction of the order. The plaintiff as receiver was empowered by the

order to keep the buildings insured and in repair, and to pay the ground rent and taxes, but he was not directed to do so. The order was obtained by himself, and this authority was manifestly inserted for his own protection, and is a usual provision in such orders. It enables the receiver to pay the ordinary charges on real estate, without special application to the court, as they accrue. Maas was not a party to the proceeding, and it cannot be supposed that this provision was voluntarily inserted by the plaintiff for the benefit of Maas, a stranger to it. The language of the order is permissive only, not mandatory. It is evident that the plaintiff, as junior mortgagee, was interested in keeping the premises insured and in repair, and in keeping down the ground rent and taxes, so that he might secure to himself any surplus which should arise on a sale under the first mortgage. But we do not think that he assumed an obligation to do so for the benefit of the prior mortgagee, in case of a depreciation which should leave no hope of a surplus. He was appointed receiver on the 26th of December, 1877, and collected the rents down to October, 1878, when the premises were sold under the first mortgages, and bought in by Maas for a sum less than the amount due on his mortgages. Maas received his deed October 31, 1878. The plaintiff, out of the rents collected by him as receiver, did in fact pay all the ground rent accruing from the time of his appointment to the time of the sale, expended some sums for repairs, and in addition paid to Maas $446.91 for interest on his mortgages, a payment which he certainly was under no obligation to make, but of which he would have had the benefit had there been any surplus. To the extent, of the sums thus paid, Maas has already had the benefit of the plaintiff's proceeding, without any expense to himself. We think there is no equity in compelling the plaintiff, who has lost his entire security, to go farther and relieve Maas from the taxes which were liens upon the property when he bought at the foreclosure sale. Some argument is based upon the fact that the mortgagor consented to the making of the order appointing the plaintiff receiver, but we do not attach much weight to this argument, as it is clear that under the

circumstances the plaintiff would have been entitled to the order, even if his application had been opposed. It was not material to Peyser whether the rents went to the plaintiff or to Maas, or to the payment of taxes. He was liable on his bond to Maas, and also on his bond to the plaintiff, and whatever payments reduced the deficiency recovered by Maas correspondingly increased the debt due to the plaintiff. The plaintiff, by his superior diligence, acquired a specific lien upon the rents in question, superior to any equities of the first mortgagee, and we think he is entitled to retain them to apply upon his mortgage. (*Washington Life Ins. Co.* v. *Fleischauer*, 10 Hun, 117; *Howell* v. *Ripley*, 10 Paige, 43; *Post* v. *Dorr*, 4 Edw. Ch. 412.)

As to the charge of $100 for a counsel fee, we do not think it should have been allowed, as the advice related rather to the plaintiff's personal interests than to his duties as receiver. But as the fee was paid out of a fund which belonged to the plaintiff, there is no materiality in the question relating to its allowance.

The order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

RICHARD PAINTON, Appellant, *v.* THE NORTHERN CENTRAL RAILWAY COMPANY, Respondent.

When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit.

An employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, but is not a guarantor of their safety; and in an action by an employee for alleged neglect to perform this duty, the *onus* is upon the plaintiff to show negligence.

Plaintiff, a brakeman in defendant's employ, was injured by the breaking of an eye bolt connecting the chain with the rod of a brake. In an action

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to recover damages it appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant, or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to.

There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury.

(Argued October 11, 1880; decided November 30, 1880.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made the first Tuesday of May, 1877, reversing a judgment in favor of plaintiff, entered upon a verdict, and granting a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by plaintiff through the negligence of defendant.

Plaintiff was in the employ of defendant as a brakeman, and while in the discharge of his duties the brake he was operating gave way, and he was thrown from a car and injured.

The further facts appearing on the trial are set forth sufficiently in the opinion.

George B. Bradley for appellant. It was the duty of the defendant and it undertook to provide suitable structures having in view the safety and protection of its employee while in the discharge of his duty. (*Laning* v. *New York C. R. R. Co.*, 49 N. Y. 521; *Booth* v. *Boston & Albany R. R. Co.*, 73 id. 38, 40; *Flike* v. *Boston & Albany R. R. Co.*, 53 id. 549; *Ryan* v. *Fowler*, 24 id. 410, 414; *Corcoran* v *Holbrook*, 59 id. 517,

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520; *Kirkpatrick* v. *N. Y. C. & H. R. R. R. Co.*, Ct. App., Dec. 16, 1879; 9 Weekly Dig. 382; *Kain* v. *Smith*, Ct. App., April 6, 1880; 10 Weekly Dig. 176; *Cone* v. *Del., L. & W. R. R. Co.*, Ct. App., June 1, 1880; 10 Weekly Dig. 232; *Fuller* v. *Jewett, Receiver, etc.*, Ct. App., February 3, 1880, 21 Alb. Law Jour. 257; 9 Weekly Dig. 443–4; *Hough* v. *Railway Co.*, 100 U. S. [10 Otto] 213; *Chicago & N. W. R. Co.* v. *Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Shauny* v. *Androscoggin Mills*, 66 Me. 420; *Gibson* v. *Pacific R. R. Co.*, 46 Mo. 163; 2 Am. Rep. 497; *Cumberland, etc., R. R. Co.* v. *State*, 44 Md. 283; *Wedgewood* v. *C. & N. Ry. Co.*, 44 Wis.; 18 Alb. Law Jour. 137.) Plaintiff had the right to understand and assume that defendant had exercised care and diligence in providing suitable means for the service he was required to perform, so as not to expose him to unreasonable risks or dangers. (*Connolly* v. *Poillon*, 41 Barb. 366, 369; affirmed by Court of Appeals, 41 N. Y. 619; *Noyes* v. *Smith*, 28 Vt. 59; approved, 24 N. Y. 414; *Jetter* v. *N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458, 461; *Ford* v. *Fitchburg R. R. Co.*, 110 Mass. 240; 14 Am. Rep. 605, 606; *Gibson* v. *Pacific R. R. Co.*, 2 id. 500; 46 Mo. 163; *Fort Wayne, etc., R. R. Co.* v. *Gildersleeve*, 33 Mich. 133; *Toledo, etc., R. R. Co.* v. *Ingraham*, 77 Ill. 309; *Ford* v. *Fitchburg R. R. Co.*, 14 Am. Rep. [110 Mass.] 606.) The evidence fairly established and authorized the jury to find that negligence on the part of defendant caused the injury complained of. (*Mullan* v. *P. & S. M. S. Co.*, 78 Penn. St. 25; *S. C.*, 21 Am. Rep. 2; *Greenleaf* v. *Illinois Central R. R. Co.*, 29 Iowa, 14; *S. C.*, 4 Am. Rep. 181, 191–2.) It is not necessary to show that the defendant had actual knowledge or notice of the defect. It is sufficient that the defendant ought to have known or could, by the exercise of reasonable care, have ascertained the defective condition of the structure at the time it was made and applied to the car. (*Gibson* v. *Pacific R. R. Co.*, 2 Am. Rep. [46 Mo.] 497, 503; *Noyes* v. *Smith*, 28 Vt. 59; *Chicago & Alton R. R. Co.* v. *Platt*, 89 Ill. 141; *Wedgewood* v. *C. & N. W. R. R. Co.*, 44 Wis.; *Connolly* v. *Poillon*,

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41 Barb. 366; affirmed by Court of Appeals, 41 N. Y. 619; *Ryan* v. *Fowler*, 24 id. 410, 414; *Brickner* v. *New York C. R. R. Co.*, 2 Lans. 506, 512, 513; affirmed by Court of Appeals, 49 N. Y. 672; *Fuller* v. *Jewett, Receiver, etc.*, Ct. App., Feb. 3, 1880; 21 Alb. Law Jour. 257; 9 Weekly Dig. 443; *Kirkpatrick* v. *New York C. & H. R. R. R. Co.*, Ct. App., Dec. 16, 1879; 9 Weekly Dig. 382; *Booth* v. *B. & A. R. R. Co.*, 73 N. Y. 38; *Flike* v. *B. & A. R. R. Co.*, 53 id. 549, 553; *Spelman* v. *Fisher Iron Co.*, 56 Barb. 151, 165; *Hough* v. *Railway Co.*, 100 U. S. 213, 220.) That state of facts was sufficient to cast the burden on the defendant of showing if such were the case that some care had been used by it. (*Russell Manuf. Co.* v. *N. H. Steamboat Co.*, 50 N. Y. 121, 126–7; *Wyckoff* v. *Queens Co. Ferry Co.*, 52 id. 32, 36; *Platt* v. *Hibbard*, 7 Cow. 498, 500, 501; *Mullen* v. *St. John*, 57 N. Y. 567; *Byrne* v. *Boodle*, 2 Hurl. & Colt. 722; *Scott* v. *London Dock Co.*, 3 id. 596; *Fietal* v. *Middlesex R. R. Co.*, 109 Mass. 398; *S. C.*, 12 Am. Rep. 720.) The defendant could not, by want of knowledge of the defective construction of the brake, escape the charge of negligence, when such want of knowledge was occasioned by mere omission to use the practical and accessible means of information of the defect. (*Chapman* v. *Erie Railway Co.*, 55 N. Y. 579, 585; *Brickner* v. *New York C. R. R. Co.*, 2 Lans. 506, 513; affirmed by Court of Appeals, 49 N. Y. 672; *Hough* v. *Railway Co.*, 100 U. S. [10 Otto] 213, 217, 219, 220, 221, 222; *Laning* v. *New York C. R. R. Co.*, 49 N. Y. 521, 532, 533; *Russell Manuf. Co.* v. *N. H. Steamboat Co.*, 50 N. Y. 121, 126; *Wyckoff* v. *Queens Co. Ferry Co.*, 52 id. 32, 36.) The plaintiff when he entered into the service assumed the ordinary risks and perils of the service incident to it and those only. (*Gibson* v. *Erie Railway Co.*, 63 N. Y. 449, 452; *Hough* v. *Railway Co.*, 100 U. S. 217; *Gibson* v. *Pacific R. R. Co.*, 2 Am. Rep. [46 Mo.] 499, 450; *Georgia R. R. & B. Co.* v. *Rhodes*, 56 Ga. 645; *Combs* v. *N. B. Cordage Co.*, 102 Mass. 572.) The plaintiff was not required to guard against perils and hazards in which the negligence of

the defendant placed him. (*Hough* v. *Railway Co.*, 100 U. S. 217; *Booth* v. *B. & A. R. R. Co.*, 73 N. Y. 40.)

George M Diven for respondent. The burden of proof in this case was upon plaintiff to show negligence in defendant. The presumption was to the contrary, and neither the breaking of the eye-bolt, nor the fact that it was defective, will overcome that presumption. (Wood's Master and Servant, § 346; *Sherman* v. *Western Transp. Co.*, 62 Barb. 150, 158.) If the car was properly constructed originally, as must be presumed, and afterward getting out of order was repaired, and this action was occasioned by the improper manner of such repair, this was the negligence of the fellow employee who made the repairs, and for this defendant is not liable, unless it was shown that there was negligence in the employment of the fellow servant who made the repairs. (*Besel* v. *New York C. & H. R. R. Co.*, 70 N. Y. 171; *Scoville* v. *E. R. R.*, 3 Weekly Dig. 114; *Coon* v. *S. & W. R. R.*, 5 N. Y. 492; *Wright* v. *N. Y. C. R. R.*, 25 id. 562; *Wonder* v. *B. & O. R. R.*, 32 Md. 411; 3 Am. Rep. 143; *Warner* v. *E. R. Co.*, 39 N. Y. 468; *Chapman* v. *E. R. R. Co.*, 55 id. 579; *Malone* v. *Hathaway*, 64 id. 5.) Knowledge that any defect existed in the appliances used by the defendant, which caused the accident, was not shown to have been brought home to the defendant. (*Warner* v. *E. R. Co.*, 39 N. Y. 468.) The risk was one assumed by plaintiff when he entered defendant's employ. (3 Am. Rep. 143 [32 Md. 411.]; *De Graff* v. *New York C. & H. R. R. Co.*, 3 T. & C. 255.)

RAPALLO, J. The judge at the trial correctly stated to the jury the rule of law governing this case, instructing them that the defendant was required to exercise care and diligence in selecting and retaining in use fit and safe machinery, and implements fit for the use to which they were applied, and that if it failed to do so, and an accident consequently occurred by which an employee was injured, without negligence on his part, he might recover.

No exception was taken to the charge, but the defendant insists that there was no evidence bringing the case within the general rule stated, and a nonsuit should therefore have been granted.

The evidence fairly authorizes the inference that the injury to the plaintiff was caused by the breaking of an eye-bolt, by which the chain of the brake which plaintiff was operating was connected with the brake-rod; that this eye-bolt was defective, in not having been properly welded, in consequence of which defect it did not possess more than one-third or one-fourth of the strength which it would have had if properly made; and also that this weakness was not attributable to use or wear, but to insufficient care in its construction.

On this branch of the case the question is, whether sufficient was shown to authorize the submission to the jury of the question whether the defendant was chargeable with notice of the defect, or negligence in not discovering it, or in using the defective bolt. The employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, but he is not held to be a guarantor of their safety, and the onus is upon the plaintiff to show some negligence on the part of the employer in respect to the performance of the duty resting upon him as above stated. (*DeGraff* v. *N. Y. Central & H. R. R. R. Co.*, 76 N. Y. 131.)

There was no evidence in this case of notice to the defendant or any of its agents to whom this duty was delegated, of the defect in the eye-bolt. Neither was it shown that the defect could have been discovered by inspection. On the contrary the testimony bore in the opposite direction, and it was shown that the defendant's cars were regularly inspected. There was evidence that the maker of the bolt could readily have discovered the defect by bending it while hot and in other ways, but there was no evidence whether it was made by the company or purchased ready made, nor can any want of care in not discovering the imperfect welding be suggested unless it be that some test should have been applied to the brake before putting the car in use, and whether or not this had been done,

the evidence does not disclose. The General Term held that the plaintiff had failed to make out his case so far as it rested upon the imperfect welding of the eye-bolt. Another defect, however, is charged by the counsel for the plaintiff which is of a different nature, and upon this the General Term does not appear to have passed. He claims that there is evidence that the eye-bolt was too small for the purpose to which it was applied. This, if established, would be a defect of which the defendant would be bound to take notice, and it would be for the jury to say whether it was sufficient to sustain the charge of negligence. The evidence on the point is not very convincing, and it can be argued with some force that, as it appears that if the bolt had been properly welded it would have been three or four times stronger than it was, its breaking is not attributable to want of size. Still, on the other hand, it may be said that if it had been of larger size, it would have been less liable to break even if partially defective. The question now is whether these matters were proper to be submitted to the jury. The testimony was that at the time of the trial the defendant used larger eye-bolts than the one which broke, though some of the witnesses testified that some of the small eye-bolts which were in use at the time of the accident still remained in use. One witness, an inspector of cars in the employ of the defendant, testified that at the time of the trial the defendant used the large eye-bolts in the brake rod, and that they did not break so much since it put them in, and that he thought it no longer used any thing like the one in question (the one which broke). No one would seem to have been in a better position to know than this witness. It also appeared that the breaking of the chain had been of frequent occurrence. Many instances were proven, though it was not stated whether the break was in the links of the chain or in the eye-bolt, except as may be inferred from the testimony of the inspector before referred to. Several witnesses were called by the defendant, with the view doubtless of proving contributory negligence on the part of the plaintiff, who testified that they habitually took precautions against being injured by the breaking of the chain, and mentioned in-

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stances showing the necessity of such precautions. The eye-bolt which broke was submitted to the inspection of the jury, who could thus form some opinion of its sufficiency in point of size, and it also appears from the case that the larger eye-bolt adopted since the accident was produced at the trial.

Most of this evidence came from the witnesses on the part of the defendant, but if it supplied any defect in the plaintiff's testimony, he is entitled to the benefit of it in support of the denial of the nonsuit. The proof of negligence on the part of the defendant was slight, but we are unable to say that sufficient was not shown to justify the submission of the case to the jury.

The order of the General Term should be reversed, and the judgment on the verdict affirmed.

All concur except FOLGER, Ch. J., not voting.

Order reversed and judgment affirmed.

PETER MARIE et al., Appellants, *v.* CORNELIUS K. GARRISON, impleaded, etc., Respondent.

Special demurrers as known to the former practice were abrogated by the Code; and no pleading is now demurrable unless it is subject to one or more of the objections specified in the provisions of the Code, defining the grounds of demurrer. (Code of Civil Procedure, §§ 488 *et seq.*)

To sustain a demurrer to a complaint it is not sufficient that facts are imperfectly or informally averred, or that it lacks definiteness and precision, or that the material facts are argumentatively averred; it will be deemed to allege what can by reasonable and fair intendment be implied from the allegations.

It seems that the remedy for indefiniteness is not by demurrer but by motion. (Code of Civil Procedure, § 546.)

Plaintiffs' complaint alleged in substance that they were the owners in their own right and in trust for others, with full power of disposal, of certain shares of the stock of the P. R. R. Co.; that an action to foreclose a third mortgage on the road, brought in the interest of the defendant G., who owned a majority of the bonds secured by the mortgage, was pending, which action certain of the stockholders were defending, on the ground that the bonds were collusive and fraudulent; that some of the plaintiffs had filed a petition to come in and defend, when G., with a view to a

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compromise, promised by letter that in consideration of the relinquishment by plaintiffs and defendant D. of further opposition to the foreclosure, in case he purchased the road on foreclosure sale, he would, upon the plaintiffs organizing a successor company and complying with certain conditions specified, convey the road to them; that plaintiffs performed the preliminary obligations contained in said agreement to be performed on their part, and in consequence G. procured a decree of foreclosure, and a sale of the road was effected; that the decree of foreclosure and sale would not have been made without their co-operation and consent; that after the making of said agree ment and in consideration of the surrender of the letter by plaintiffs, and of their consent to a modification of the terms of the agreement, G. agreed that, in case of a sale under the decree, he would become the purchaser, and would forthwith organize a successor company, and convey the road to it, and would deliver to plaintiffs in return for their stock an equal amount of paid-up stock of the new company; that the road was purchased on the foreclosure for the benefit of G., and a new company was organized, to which the property was conveyed, but that G. refused to perform his agreement to issue the new shares in exchange for plaintiffs' stock. Upon demurrer to the complaint, *held*, that its averments were sufficient to constitute a cause of action, that it alleged a sufficient consideration for the original promise of G., and the surrender of the option given thereby to plaintiffs, was a sufficient consideration for the substituted agreement. Also, that the averment of a refusal by G. to issue new shares in exchange for the old stock implied a tender of the old shares.

It is not essential to the existence of a consideration for a promise that mutuality of obligation should exist between the parties at the time of the making of the promise.

Where a proposition is made by one party accompanied by a promise, a voluntary performance by another to whom the proposition was made of the requirements in consideration of the promise, constitutes a consideration which will uphold the promise, and make it binding.

The complaint was also demurred to on the ground of a misjoinder of parties, in that plaintiffs' interests were distinct and several, and so they could not unite. *Held*, untenable; that it did not follow from the fact of an individual or several ownership by the plaintiffs of the shares in the old company that their interest in the contract with G. was not joint; that plaintiffs had a right to combine their shares, and to enter into contracts jointly, which was in fact done; that as to the stock held by plaintiffs as trustees, they could maintain an action in their own names, without setting out the trusts, at least that it did not appear on the demurrer that they were not so entitled.

The agreement was claimed to be unlawful, as a collusive arrangement to establish a fraudulent debt and as calculated to prevent competitive bidding on the foreclosure sale. *Held*, untenable.

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The mere fact that an arrangement entered into by parties having an interest in property about to be sold at public or judicial sale, with honest motives, for the purpose of preserving their interests, may incidentally restrict competition upon such sale, does not render the agreement illegal.

Marie v. *Garrison* (13 J. & S. 158), reversed.

(Argued October 12, 1880; decided November 30, 1880.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, in favor of defendants, entered upon an order made April 30, 1879, reversing an order of Special Term, which overruled a demurrer to the complaint herein, and sustaining said demurrer. (Reported below, 13 J. & S. 158.)

This action was brought to recover damages for an alleged breach of contract.

The complaint alleged in substance that the plaintiffs and the defendant, John T. Denny, owned and held, "either in their own right or in trust for others, with full power of disposition," 36,000 shares of the capital stock of the Pacific railroad of Missouri; that the defendant, Garrison, held $2,200,000 out of an issue of $4,000,000 of bonds issued by the said Pacific railroad, known as "Third Mortgage Bonds;" that said bonds were of doubtful validity, it being claimed by the stockholders that they were collusive and fraudulent; that in November, 1875, a collusive suit, in the interest of Garrison and those associated with him, had been commenced by George E. Ketchum, to foreclose the mortgage given to secure the said bonds; that Garrison was admitted as a co-complainant therein; that certain stockholders had intervened in said suit and filed an answer and cross-bill, alleging collusion and fraud on the part of the directors of said road in the issue of said bonds; that some of the plaintiffs had filed a petition to be made parties defendant in said suit, and to be allowed to intervene and defend in their own behalf and in behalf of all other stockholders; that the stockholders' interest in the equity of redemption in said railroad was of a value of $8,000,000; that on or about the 29th

day of March, 1876, the defendant, Garrison, "with a view of compromising said conflicting claims, * * * * and in consideration of the relinquishment by plaintiffs of all further opposition to the foreclosure suit," entered into an agreement with plaintiffs, evidenced in part by a letter written by Garrison to plaintiffs and Denny, a copy of which letter was annexed to and made part of the complaint. The substance of it was, that in the event the road was sold under the foreclosure procedings, and Garrison became the purchaser, and if, at any time within six months after such purchase the parties to whom the letter was addressed should organize a successor company, and should pay to him certain expenses and disbursements specified, he would convey to them or to the successor company the property so purchased. Further conditions were stated as to the issuing and disposal of bonds and stock by the new company.

The complaint then contained the following averments:

"The plaintiffs aver that they and the defendant Denny performed and fulfilled all the preliminary obligations in the said agreement contained and agreed to be performed on their part and behalf, and in consequence thereof said defendant, Garrison, was enabled to procure a judgment and decree of foreclosure on or about June 6, 1876, and a sale of said premises on or about the 6th day of September, 1876, which sale was confirmed by the court in the month of October, 1876."

"That the plaintiffs say that in the month of June, 1876, at and in the city of New York, the plaintiffs and the said Denny, at the special instance and request of the said defendant Garrison, surrendered the aforesaid letter to said Garrison, and in consideration of such surrender, and of the plaintiffs consenting to a modification of the terms of said agreement with said Garrison, as contained in part in said letter, said Garrison promised to and agreed with the plaintiffs and said Denny, that in the event said Pacific railroad (of Missouri) should be sold under the decree of foreclosure in said suit, and in the event that he, said Garrison, or any one for him, should become the purchaser thereof, he would forthwith

organize a successor company under the laws of the State of Missouri, and would convey or cause to be conveyed thereto all the property of the said Pacific railroad purchased at the said foreclosure sale under said decree; that the capital of the said successor company should not exceed $8,000,000 in amount, and that after executing new bonds and a new mortgage in the amount of $4,500,000, to be issued and used in satisfying and paying off the claims of the said third mortgage bondholders, or of the holders of the income and improvement bonds of said company, he would deliver to the plaintiffs and said Denny, in return for the amount of stock of the Pacific railroad so as aforesaid held by them, thirty-six thousand full paid shares of the par value of $100 each, amounting in the aggregate to the sum of $3,600,000, which stock was to be issued by the said successor company, and the said Garrison then and there promised to and agreed with the plaintiffs and said Denny to purchase the said property at the said foreclosure sale, and assured them of his power and intention of protecting them in their rights of property as stockholders of the said Pacific railroad.

* * * * * * *

"The plaintiffs aver that, without their co-operation and consent, a decree of foreclosure and sale would not have then been made, or made at all until after a trial by the court, the result of which trial was in doubt; the plaintiffs claiming as above set forth in relation to the bonds and mortgage given to secure the payment of the same."

The complaint then alleged, that on or about September 6, 1876, the said road and the property of the company was sold under the foreclosure decree, and was purchased by one Baker for Garrison, who, in connection with Baker, immediately organized a successor company, to whom the property was conveyed, "in which organization he then and still does refuse to allow the plaintiffs any interests or benefits." Also, "that, although often requested so to do, the said Garrison has refused and does refuse to fulfill his said contract and agreement with the plaintiffs, and to issue or cause to be issued and delivered to the plaintiffs thirty-six thousand shares of stock in

said company, in exchange for the stock of the Pacific railroad, so as aforesaid held by the plaintiffs."

The complaint was demurred to on the following grounds: 1st. That it did not state facts sufficient to constitute a cause of action. 2d. That it did not appear that plaintiffs, or either of them, had a legal capacity to sue, as it did not appear whether they were suing in their own right or in trust for others, and no authority was shown to sue in trust. 3d. That there was a misjoinder of parties plaintiff, as it did not appear that they had any joint cause of action. 4th. That there was a defect of parties plaintiff, as other parties should have been joined as plaintiffs.

Wm. A. Beach for appellants. A complaint is not to be deemed as uniting several causes of action because it sets forth several grounds relative to the same transaction, on either of which the defendant would be liable. (*Durant* v. *Gardner*, 10 Abb. Pr. 445; *Adams* v. *Holley*, 12 How. Pr. 329; *Sheldon* v. *Lake*, 9 Abb. Pr. [N. S.] 306; *Thompson* v. *Minford*, 11 How. Pr. 273; *Buckner* v. *Astor Mut. Ins. Co.*, 1 E. D. Smith, 553.) A demurrer on the ground of insufficiency can only be sustained when the complaint presents defects so substantial and fatal as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever. (*Richards* v. *Edick*, 12 Barb. 260; *Graham* v. *Camman*, 5 Duer, 697; *Prindle* v. *Carruthers*, 15 N. Y. 425; *The People* v. *Ryder*, 12 id. 436.) The complaint sets forth a valid contract between the parties, and a breach thereof by the defendant, Garrison. (2 Blackstone's Com's, 446; *Sturges* v. *Crowninshield*, 4 Wheat. 197; 1 Parsons on Contracts, p. 6; *Van Alstyne* v. *Van Slyck*, 10 Barb. 383; *Sands* v. *Crooke*, 46 N. Y. 564; *Dutch* v. *Mead*, 4 J. & S. 429, affirmed 59 N. Y. 628; *Worrall* v. *Munn*, 5 id. 229; *Justice* v. *Long*, 42 id. 493; *Dair* v. *U. S.*, 6 Wall. 4.) The promise of defendant was founded on sufficient consideration. (*Palmer* v. *North*, 35 Barb. 282; *White* v. *Hoyt*, 73 N. Y. 505; *Donner* v. *Church*, 44 id. 647; *Wehrum* v. *Kuhn*, 2

J. and S. 336, affirmed 61 N. Y. 623; *Coster* v. *Brush*, 25 Wend. 628; *Union Bk.* v. *Geary*, 5 Peters, 99; *Sykes* v. *Chadwick*, 18 Wall. 141; *Gratz* v. *Cohn*, 11 How. 1; *French* v. *Shoemaker*, 14 Wall. 314; *Phillpot* v. *Grumerger*, id. 576; *Bohn* v. *Goldstein*, 53 N. Y. 634; *Ledrum* v. *Clarke*, 6 Weekly Dig. 438; *White* v. *Baxter*, 71 N. Y. 254.) Where a defendant has actually received the consideration of an agreement, it is no answer to an action against him for a breach of his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, if in fact it appears that the promises in question have been performed in good faith and without prejudice to the defendant. (Addison on Contracts [6th ed.], 15; *Morton* v. *Burn*, 7 Ad. & El. 19; *Storm* v. *U. S.*, 94 U. S. R. [4th ed.] 15.) The surrender of the written contract to defendant was abundant consideration for the second parol promise. (*Mason* v. *Decker*, 72 N. Y. 595; *Munroe* v. *Perkins*, 9 Peck. 298.) The contract related to an incorporeal thing, having no apparent palpable form. The statute of frauds does not apply. (*Coleman* v. *Eyre*, 45 N. Y. 38; *Parsons* v. *Loucks*, 48 id. 17; *Smith* v. *N. Y. C. R. R.*, 4 Alb. Ct. of App. Dec. 262; *Cooke* v. *Millard*, 65 N. Y. 358; *Somerby* v. *Bunten*, 118 Mass. 279; *Williams* v. *Morris*, 95 U. S. Rep. [5 Otto] 444; Chitty Contr., 10th ed. 66, 278; 2 Story Eq. Juris., § 761; *Swain* v. *Seamans*, 9 Wall. 254.) If the rescission of the first agreement was ineffectual, it must remain a valid and subsisting obligation. (*Pope* v. *Nance*, 1 Stew. [Ala.] 354.) The surrender of the certificates of stock after the property which they represented was gone, was a mere matter of form, and was not necessarily called for under the contract as alleged. (*Highland T. Co.* v. *McKean*, 11 Johns. 98; Sergeant Williams' 2d Rule in note to *Pordage* v. *Cole*, 1 Wm. Saunders, 310; *Underhill* v. *S. & W. R. R. Co.*, 20 Barb. 455; *Northrup* v. *Northrup*, 6 Cow. 296; *Morris* v. *Silter*, 1 Denio, 59; *Paine* v. *Brown*, 37 N. Y. 228.) It is a question of intention whether the several parts of a contract made at one and the same time are to be taken distributively and are independent, or whether entire perform-

ance by one party is a condition precedent to his right of recovery against the other party in respect to a portion of the contract which he has fully performed. (*Tipton* v. *Feitner*, 20 N. Y. 430; *Bennett* v. *Exr. of Pixley*, 7 Johns. 249; *Tompkins* v. *Elliott*, 5 Wend. 496.) The breach of the contract by Garrison relieved the other party from the useless formality of tendering performance even of a condition precedent, and gives immediate right of action. (*Howard* v. *Daly*, 61 N. Y. 370; *Cort* v. *Ambergate R. R. Co.*, 6 Eng. L. & Eq. 230; *Hockster* v. *Delavan*, 20 id. 157; *Frost* v. *Knight*, 7 Law Rep. 111 [Exc. Ch.]; *Burtis* v. *Thompson*, 42 N. Y. 246; *Franchot* v. *Leach*, 5 Cow. 506; *Trever* v. *Halsted*, 23 Wend. 66; *Cornwell* v. *Haight*, 21 N. Y. 462; *Blewett* v. *Baker*, 58 id. 611; *Shaw* v. *Republic Life Ins. Co.*, 69 id. 286; *Bunge* v. *Koop*, 48 id. 225; *Crary* v. *Smith*, 2 id. 60.) Tender by plaintiffs of this stock was not necessary. (*Hay* v. *Hay*, 6 Weekly Dig. 158; *Nichols* v. *Michael*, 23 N. Y. 264; *White* v. *Talmage*, 3 J. & S. 223; *Cornwell* v. *Haight*, 21 N. Y. 462; *Grugg* v. *Von Phul*, 1 Wall. 275.) He who prevents a thing being done shall not avail himself of the non-performance he has occasioned. (*Homer* v. *Guardian Mut. Life Ins. Co.*, 67 N. Y. 478; *Jenks* v. *Robertson*, 58 id. 621; *Gallagher* v. *Nichols*, 60 id. 438; *Risley* v. *Smith*, 64 id., 516; *Hawley* v. *Keeler*, 53 id. 114.) There is nothing illegal or prohibited in the contract itself. (*Marsh* v. *Russell*, 66 N. Y. 288; *Philpen* v. *Stickney*, 3 Metc. 384; *Wicker* v. *Hoppock*, 6 Wall. 94.) The question of an illegal consideration cannot be raised on a demurrer; it must be pleaded. (*Tyler* v. *Rand*, 7 How. U. S. 583; *Fellowes* v. *Taylor*, 7 Tenn. R. 475.) There was no misjoinder of parties plaintiff. (*Loomis* v. *Brown*, 16 Barb. 331; 1 Parsons on Contracts, 11; *Yorks* v. *Peck*, 14 Barb. 644.) If the demurrer is sustained and the judgment affirmed, plaintiffs should be allowed to amend their complaint under section 497 of the Code of Civil Procedure. (*Miller* v. *Mayor*, 76 N. Y. 151.)

Henry L. Clinton and George F. Comstock for respondents. To sue as trustees of express trusts under the Code, it was nec-

essary for plaintiffs to have named themselves as trustees in the title of the suit, and to have averred that they were such trustees, and to have set forth the nature and terms of their authority. (*Smith* v. *Livinus*, 4 Seld. 472, 474; *Freeman* v. *Fulton Fire Ins. Co.*, 14 Abb. Pr. 398; *Western R. R. Co.* v. *Nolan*, 48 N. Y. 513; *Root* v. *Price*, 22 How. Pr. 372–4; *Selden* v. *Hoyt*, 11 How. Pr. 11–14; Van Santford's Pl. marginal p. 93.) There being no executed consideration on the part of the plaintiffs, and no promise by them averred, the letter of Garrison of March 29, 1876, never became obligatory. (*Speer* v. *Downing*, 22 How. Pr. 30.) Under the Code the plaintiffs were bound to state the terms of their contract and what conditions precedent they were to perform. (*Adams* v. *Mayor, etc.*, 4 Duer, 295.) The cause of action attempted to be stated, being a contract not to bid at a judicial sale, is void. (*Hook* v. *Turner*, 22 Mo. 396; *Gray* v. *Hook*, 4 Conn. 449, 455; *Jones* v. *Casewell*, 3 Johns. 29; *Doolin* v. *Ward*, 6 id. 194; 8 id. 444; *Brisbane* v. *Adams*, 3 Conn. 129; Smith's Law of Contracts, marginal p. 193; *Ross* v. *Truax*, 21 Barb. 361; *Marsh et al.* v. *Russell et al.*, 66 N. Y. 292; *Saratoga Co. Bk.* v. *King*, 44 id. 87; *People* v. *Lord*, 6 Hun, 390; *Atcheson* v. *Mallon*, 43 N. Y. 147.) The allegation of a refusal by the defendant Garrison, without showing any offer of performance or even readiness to perform on the part of the plaintiffs, is not sufficient. (1 Chitty's Pl. [ed. of 1844] pp. 321, 326; *Oakley* v. *Morton*, 11 N. Y. 25–30; *Lester* v. *Jewett*, id. 453.) There is nothing in the amended complaint which shows such a unity of interest in the plaintiffs as authorizes them to join as such in this action. (*Jones* v. *Felch*, 3 Bosw. 63; *Buckman* v. *Brett*, 35 Barb. 596; 13 Abb. 119.) The contract being tainted with fraud was void. (*Miss. & Mo. R. R. Co.* v. *Howard*, 7 Wal. 392; *Jones* v. *Casvell*, 1. Johns. Cas. 29; *Doolin* v. *Ward*, 6 id. 194; *Wilbur* v. *Grow*, 8 id. 346; *Thompson* v. *Davies*, 13 id. 112; *Hawley* v. *Cramer*, 4. Cow. 191; [on demurrer], *Meech* v. *Bennett*, Lalor's Supp. 191; *Wheeler* v. *Wheeler*, 5 Lans. 355; *Brackett* v. *Wyman*, 48 N. Y. 567; *Atcheson* v. *Mallon*, 43 id. 147; *Howell* v. *Mills*, 53 id. 322.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. Special demurrers, as known to the former practice, have no place in our present system of pleading. The Code authorizes a demurrer for specific causes and no pleading is demurrable unless it is subject to one or more of the objections specified in the section defining the grounds of demurrer. A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. (1 Chitty's Pl. 713; *Haight* v. *Holley*, 3 Wend. 258; *Prindle* v. *Caruthers*, 15 N. Y. 425.) The remedy for indefiniteness is not by demurrer, but by motion. (Code, § 546; *Seeley* v. *Engell*, 13 N. Y. 542.) "Indefiniteness," says Chitty, "is in general only matter of form." (1 Chitty's Pl. 717.) The rule by which, under the Code, the sufficiency of a complaint is to be determined is stated by DENIO, J., in *Zabriskie* v. *Smith* (13 N. Y. 330.) He says: "It is sufficient that the requisite allegations can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language."

In the light of these rules we proceed to examine the question whether the complaint in this case sets forth a cause of action. It is undoubtedly essential, to sustain the complaint, that it should appear therein that a valid contract was entered into by Garrison, from the breach of which a right of action has accrued to the plaintiffs and Denny. It is insisted, on the part of Garrison, that the promise upon which the action is based is, so far as the complaint shows, a mere *nudum pactum*, no valid consideration therefor being averred. The oral agreement of June, 1876, upon which the action is brought, is alleged to have been made in consideration of the surrender by the

plaintiffs and Denny to the defendant, Garrison, of the letter of March 29, 1876, and of their consenting to a modification of the terms of the agreement contained therein, and no other consideration is averred or can be gathered from the terms of the substituted agreement. If the contract surrendered was itself a *nude pact*, its surrender formed no valid or legal consideration for the substituted promise. If, on the other hand, it was binding and valid, it needs no citation of authorities to show that its surrender was in law a good consideration for the new agreement.

Does, then, the complaint show, either directly or by fair inference, a valid consideration for the conditional promise of the defendant, Garrison, contained in the letter? No consideration appears in the letter itself. It shows in general terms the situation of the Pacific Railroad Company and the relation of the parties to it; that Garrison was the owner of a majority in amount of the third mortgage bonds of the road, and that the parties to whom the letter was addressed were stockholders therein, and that a foreclosure action to foreclose the third mortgage was pending at the suit of one Ketcham. The letter contains, in substance, a promise by Garrison that if he should purchase the road on the foreclosure, he would, upon the plaintiffs organizing a successor company within six months after the purchase and making the payments and complying with the other conditions specified, convey the road to them. He does not bind himself to purchase; but in the event that he does purchase his undertaking to convey the road on the terms stated is absolute. In substance, Garrison agreed in case he purchased the road to give the plaintiffs the option to take it upon the terms proposed at any time within six months after such purchase.

The complaint in its introductory averments sets forth that the plaintiffs and Denny "owned and held either in their own right, or in trust for others with full power of disposition," thirty-six thousand shares of the capital stock of the Pacific railroad of Missouri, of the aggregate par value of $3,600,000; that the defendant held $2,200,000

of the $4,000,000 issue of third mortgage bonds, which it is alleged were of doubtful validity, and were claimed by the stockholders to have been fraudulently and collusively issued by the directors of the company, and without the consent of the stockholders, as required by the laws of Missouri; that the defendant was solicitous to have the bonds adjudicated to be valid, and that a collusive foreclosure suit, in the interest of Garrison and others, was commenced by Ketcham in November, 1875, to foreclose the third mortgage, and was pending, in which suit the defendant had in April, 1876, been admitted as co-complainant, and had become the principal party in prosecuting the same; that certain stockholders had intervened in the suit, and filed an answer and cross-bill, alleging collusion and fraud on the part of the directors of the road in the issue of the bonds; that some of the plaintiffs had filed a petition in the foreclosure suit to be made parties, and to be allowed to defend the same in their own behalf, and in behalf of other stockholders; that the value of the equity of redemption in the road was $8,000,000. Following these introductory averments of the complaint, are paragraphs five and six, upon which the plaintiffs rely as containing an averment of a consideration for the defendant's promise contained in the letter, as follows:

"5th. That on or about the 29th day of March, 1876, with the view of compromising said conflicting claims, and establishing the validity of said debt of $4,000,000 in the hands of said Garrison (the defendant Garrison) and others of his associate bondholders, and to prevent the plaintiffs from defending said foreclosure suit, and in consideration of the relinquishment by the plaintiffs of all further opposition to said foreclosure suit, the said Garrison, the defendant, entered into an agreement with plaintiffs, evidenced in part by a letter written by him to some of the plaintiffs and the defendant Denny, a copy of which is hereto attached, marked 'A,' and the same is made a part of this complaint.

"6th. The plaintiffs aver that they and the defendant, Denny, performed and fulfilled all the preliminary obligations in the said agreement contained and agreed to be performed on their

part and behalf, and in consequence thereof said defendant, Garrison, was enabled to procure a judgment and decree of foreclosure on or about June 6, 1876, and a sale of said premises on or about the 6th day of September, 1876, which sale was confirmed by the court in the month of October, 1876, viz.: October 6, which confirmation was modified October 23, 1876."

It is not averred that the plaintiffs and Denny agreed to relinquish their opposition to the foreclosure in consideration of the agreement of Garrison, contained in the letter. But the averments contained in the paragraphs quoted do fairly import that in consequence of their relinquishment of such opposition the defendant, Garrison, was enabled to procure a judgment of foreclosure and sale, and it is averred in a subsequent part of the complaint that without their "co-operation and consent a decree of foreclosure and sale would not then have been made, or made at all until after a trial by the court, the result of which trial was in doubt." It is not essential to the existence of a consideration for the defendant Garrison's agreement, that mutuality of obligation should have existed between the parties when his agreement was made. The necessary consideration would arise if the plaintiffs and Denny, in compliance with the proposition in his letter, and in consideration of his promise therein, did in fact discontinue their opposition to the foreclosure, although they did not at the time bind themselves to do so. When a defendant has actually received the consideration of an agreement by a voluntary performance of an act by the other party, upon his proposition or suggestion, such performance constitutes a consideration which will uphold the defendant's promise. (*Sands* v. *Crooke*, 46 N. Y. 564; *Morton* v. *Burn*, 7 Ad. & El. 25; *Storm* v. *U. S.*, 94 U. S. 83.) The fair intendment from the allegations of the complaint is that Garrison undertook to do the things promised in his letter, in case the plaintiffs would relinquish the opposition to the foreclosure, and that they did subsequently relinquish their opposition, thereby enabling him to secure judgment of foreclosure. In this view we think the complaint sufficiently averred a consideration for his original promise,

and that the surrender of the option to purchase the road, in case it should be bid off by Garrison, was a good consideration for the substituted oral agreement.

By the substituted agreement, Garrison agreed to bid off the road on the foreclosure sale, and organize a successor company, upon a basis stated in the complaint, and "deliver to said plaintiffs and said Denny, in return for the amount of the stock of the Pacific railroad so as aforesaid held by them, thirty-six thousand full paid shares of the par value of one hundred dollars each," in the new organization.

It is claimed that this agreement was illegal on two grounds: *first*, that it was a collusive arrangement between the parties to establish a fraudulent and invalid debt, and procure a sale of the property of the company thereon to the prejudice of the other stockholders and creditors; and *second*, that the agreement was calculated to prevent competitive bidding between the parties on the foreclosure sale, contrary to the general principles and policy of the law.

We think that neither of these points is well taken. The complaint does not allege that the third mortgage bonds were in fact fraudulent. It alleges that they were of doubtful validity, and then proceeds to specify various particulars in respect to which it was claimed that they were invalid, as before stated. It is not alleged that Garrison was a party to the fraud, if any existed in the issue of the bonds, or that the company did not receive their full value, or that they were not given to secure a valid debt, nor does it appear that the mortgage debt could not have been enforced in equity against the property of the company. The allegations of the complaint do not justify the inference that the parties were colluding to enforce a fictitious debt against the company, and it is difficult to see what interest the plaintiffs could have had to have united in such a conspiracy.

In respect to the second ground of alleged illegality it is to be observed, that the magnitude of the property involved in the foreclosure would naturally prevent an individual (unless possessed of great wealth) from bidding on the sale. The

plaintiffs, who together owned a large number of shares, had a right to enter into any arrangement for the protection of their interests not prohibited by law. This was not the case of a combination between persons having no prior interest in the property to suppress bidding at a judicial sale for speculative purposes. The arrangement made was, so far as appears, a reasonable and honest attempt on the part of the plaintiffs, to save their property from being sacrificed on the foreclosure. The other stockholders and bondholders were at liberty to bid on the sale. The mere fact that an arrangement, fairly entered into, with honest motives, for the preservation of existing rights and property, may incidentally restrict competition at a public or judicial sale, does not, we think, render the arrangement illegal. The question of intent, at all events, is one for the jury, upon the whole facts as they shall appear on the trial. (*Marsh* v. *Russell*, 66 N. Y. 288; *Phippen* v. *Stickney*, 3 Metc. 384; *Wicker* v. *Hoppock*, 6 Wall. 94.)

The complaint shows that the road on the foreclosure sale was purchased for the defendant, Garrison, in the name of a third party, and that he subsequently organized a new company. The complaint then alleges, "that although often requested so to do, the said Garrison has refused and does refuse to fulfill his said contract with the plaintiffs, and to issue or cause to be issued and be delivered to the plaintiffs thirty-six thousand shares of stock in said (new) company, in exchange for the stock of the Pacific railroad, so as aforesaid held by the plaintiffs." It is claimed that the complaint is defective, for the reason that it shows no offer, readiness, or even ability to surrender the thirty-six thousand shares of old stock in exchange for the new shares. This objection is unanswerable, unless a tender of the old shares is implied in the averment of the refusal of Garrison to issue the new shares in exchange for the stock of the old company held by the plaintiffs. Bearing in mind that what is implied in an averment is on demurrer to be taken as if the thing implied is directly averred, and that an argumentative pleading is not for that reason demurrable, we conclude, although not without some hesitation,

that an averment of a refusal to exchange does import that the other party offered to do that without which no exchange could be effected, viz.: that he tendered the property or thing which was the consideration of that which he was to receive and which he called on the other party to deliver.

It is made a separate ground of demurrer that there is a misjoinder of parties plaintiffs. This is one of the grounds of demurrer under the new Code (§ 448). This objection is predicated in part upon the general rule that parties whose interests are divided, distinct and several, cannot unite as plaintiffs, and it is asserted that the interests of the plaintiffs under the contract sued upon were several and distinct within the rule stated. We concur in the view of the defendant's counsel that the rational construction of the pleader's allegation in the introductory clause of the complaint, that the plaintiffs and Denny "owned and held, either in their own right or in trust for others," the thirty-six thousand shares, etc., is that they held shares distributively and severally aggregating that number, one or more holding their shares individually, and one or more holding shares in trust, or that one or more, or each, held shares both individually and in trust. But we think it does not follow from the individual or several ownership by the plaintiffs of the shares in the old company, that their interest in the contract with Garrison was several and not joint, or that Garrison's contract was with the plaintiffs severally and distributively.

There seems to be no difficulty, in the nature of things, in the plaintiffs as owners of distinct and several shares of stock in the same company uniting and combining their shares in one aggregate for the purpose of sale as an entire property to one person, and taking from him a promise to pay them jointly a gross sum, equal to their aggregate interests, leaving them, as between themselves, to arrange the distribution of the fund which shall be derived from the sale. The circumstances of this case show that such an arrangement may be of great practical convenience, and we know of no peremptory rule of law which forbids it. The promise of Garrison was,

in form, a promise to the plaintiffs jointly. He entered into no undertaking to transfer to each plaintiff shares corresponding with the shares held by him in the old company. His promise was on receiving from the plaintiffs, as an aggregation of individuals, thirty-six thousand shares, to give them in exchange thirty-six thousand other shares. The shares to be transferred by them to Garrison, and by Garrison to the plaintiffs, were to be transferred *in solido*. The legal interest of the plaintiffs in the contract was joint, although their interest in the shares to be transferred by Garrison or in the damages which may be recovered may be unequal and separable. The construction of the contract is, we think, precisely the same as if the plaintiffs had been joint owners of the shares when the contract was made. (See *Emery* v. *Hitchcock*, 12 Wend. 156; *Loomis* v. *Brown*, 16 Barb. 331; 1 Pars. on Cont. 19, and cases in note.)

It is also claimed that there is a misjoinder of causes of action in behalf of trustees, with causes of action in favor of individuals, and also that the complaint is defective in not setting forth the trust under which the trust shares were held. But the averment in the complaint that the shares were held by the plaintiffs either in their own right or in trust, is an averment simply of legal title of the plaintiffs to the shares mentioned. The action is not an action by trustees to enforce a trust, or upon a contract made by the plaintiffs in a representative character. The contract is with the plaintiffs as individuals, and we are of opinion that an action may be maintained thereon by them in their own names, without setting out the trust or referring to their character as trustees. At least it cannot appear on demurrer that the plaintiffs are not entitled to maintain the action in their individual capacity. (See *Merritt* v. *Seaman*, 6 N. Y. 168; *Mellen* v. *Hamilton F. Ins. Co.*, 17 id. 615; 1 Chitty's Pl. 3.)

Our conclusion is that the demurrer was properly overruled at the Special Term. It must be admitted that the complaint is indefinite and argumentative, and that material facts are obscurely averred, but we think that it is not defective in sub-

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stance within the rules by which the sufficiency of pleadings on demurrer is tested.

The judgment of the General Term should be reversed and the judgment of the Special Term affirmed, with leave to the defendant to answer on payment of costs.

All concur, except FINCH, J., taking no part.

Judgment accordingly.

THE EATON, COLE & BURNHAM COMPANY, Respondent, *v.* ROBERT AVERY, Appellant.

Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor, against the partner making such false representations.

It seems that the court will take judicial notice of the nature of the business and the office of mercantile agencies.

A person furnishing information to such an agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him.

In such an action plaintiff's evidence was to the effect that a person employed by the mercantile agency applied to defendant for a statement of the means of his firm, to be reported to the agency, informing him of the object of his visit; that defendant stated the capital of the firm to be $20,000 chiefly contributed by him, in money, and gave further particulars. The employe reduced the statement to writing and afterward transcribed it on the books of the agency. Defendant subsequently applied to E., plaintiff's president, to sell his firm goods on credit. E., before making the sale, sent to the office of the agency for information as to the responsibility of the firm and received an answer in writing which gave the substance of defendant's statements. This E. examined, and he relied entirely on the report in making the sale. After the failure of defendant to pay, E. exhibited to him the statement, he admitted the making of the representations therein. Defendant did not in fact contribute any capital either in money or property; the other partner contributed tools

Statement of case.

valued at $4,000, of which E. agreed to pay half but did not. E., about the time he made the statement, advised his partner that he was going to the agency to put this property in the name and to the credit of the firm, and afterward stated to him that he had valued the firm at $25,000. *Held*, that the evidence justified a refusal to nonsuit; that it authorized a finding that the alleged false statement as to capital was made to give the firm a credit it was not entitled to and with intent to defraud any person who might inquire of the agency.

The commercial agency in its answer added to the statement as to what defendant had represented a caution to the effect that it did not confirm it, that the claims of the firm for credit were not yet established, and that "small amounts should rule, though so far have paid as agreed." *Held*, that it was for the jury to determine, and defendant was entitled to have them instructed, that they might take into consideration whether the representations were such as were calculated under the circumstances to deceive a prudent man.

(Submitted October 14, 1880; decided November 30, 1880.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. The decision of the General Term was made February 13, 1879. (Reported below, 18 Hun, 44.)

The nature of the action and the facts are set forth sufficiently in the opinion.

John H. Bergen for appellant. Plaintiff cannot recover where the facts and circumstances are such that they ought to have excited suspicion and led to inquiry. (*Williams* v. *Brown*, 15 N. Y. 351; *Heulich* v. *Brennan*, 11 Hun, 194.) Plaintiff could not maintain this action even if it had given credit, relying on the report. (Cooley on Torts, pp. 476, 487, 493, 496; *Long* v. *Warren*, 68 N. Y. 426; *Peck* v. *Gurney*, 8 Moak's Eng. Rep. 1; *Barry* v. *Croskey*, 2 J. & H. 117, 118, 123: *Langridge* v. *Levy*. 4 M. & W. 337.)

John L. Hill for respondent. Defendant was properly held for fraud if he materially misrepresented the financial ability of his firm through the commercial agency, for the purpose of obtaining, and thereby actually obtained the plaintiff's goods on

credit. (25 Barb. 583; *Cazeaux* v. *Mali*, id. 578; 31 id. 129; *Newbury* v. *Garland*, id. 121; *Bruff* v. *Mali*, 36 N. Y. 200; *Morgan* v. *Skiddy*, 62 id. 319; *Westcott* v. *Ainsworth*, 9 Hun, 53.)

RAPALLO, J. This is an action for deceit, in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be communicated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a

remedy for having been deceived and defrauded by means thereof. (*Cazeaux* v. *Mali*, 25 Barb. 578; *Newbery* v. *Garland*, 31 id. 121; *Bruff* v. *Mali*, 36 N. Y. 200; *Morgan* v. *Skiddy*, 62 id. 319; *Commonwealth* v. *Call*, 21 Pick, 515, 523; *Commonwealth* v. *Harley*, 7 Metc. 462.) The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers to the agency when applied to by a customer to sell goods to him on credit, may by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such an agency a willfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated, and who acts in reliance upon its truth. If A. casually or from vanity makes a false or exaggerated statement of his pecuniary means to B. or even if he does so with

intent to deceive and defraud B. and B. communicates the statement to C. who acts upon it, A. cannot be held as for a false representation to C. But if A. makes the statement to B. for the purpose of being communicated to C. or intending that it shall reach and influence him, he can be so held. In *Commonwealth* v. *Call* (21 Pick. 515), the court say on this point at page 523 that the representation was intended to reach P. and operate upon his mind; that it did reach him, and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In *Commonwealth* v. *Harley* (7 Metc. 462), the prisoner was indicted for obtaining goods by false pretenses from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co. who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A. make a false statement of his affairs to B. and then publicly hold out B. as his reference, can it be doubted that he would be bound by the communication of his statement by B. to any person who might inquire of him in consequence of this reference? That case differs from the present one only in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information or whether he gave it on their application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the

agency to give information upon which persons applying for it might act, in dealing with the defendant's firm.

The case is a new one in its facts, but the principles by which it should be governed are well established.

The further question arises on this appeal, whether there was sufficient evidence to justify the submission of the case to the jury under the rule of law which has been stated, or whether the motion for a nonsuit should be granted. In considering this question we must lay out of view the evidence on the part of the defendant, which is contradictory of that on the part of the plaintiff, but which is largely relied upon in the statement of the case in the points of the appellant, and we must put the most favorable construction upon the plaintiff's evidence. The evidence on the part of the plaintiff is in substance as follows: An employee of Dun, Barlow & Co., a mercantile agency, testified that in August, 1875, he applied to the defendant for a statement of the means of defendant's firm, to be reported to Dun, Barlow & Co.; that he presented to defendant the card of Dun, Barlow & Co., and informed him of the object of his visit, and the defendant professed himself pleased to give all the information pertaining to his business which Dun, Barlow & Co. required; that he then stated that the capital of the firm was $20,000, chiefly furnished by himself, and that the capital so contributed by him was in money, and then went on to give further particulars. The employee reduced the statement to writing, and afterward transcribed it in the books of Dun, Barlow & Co. Mr. Eaton, the president of the plaintiff, testified that in September, 1875, the defendant applied to him to sell to his firm some goods on a credit of thirty days; that before making the sale and while the matter was under advisement, he (Eaton) sent to the office of Dun, Barlow & Co. for information as to the responsibility of Avery & Riggins, and they sent him an answer in writing, which, after he had examined it, he put in his record book. This paper the witness produced at the trial, and he testified that in the following February, after the defendant had failed to pay for the goods, he, the witness, read to the defendant the identical

report which he had received from Dun, Barlow & Co as above stated, and asked him if it was correct, and the defendant replied that the agent of Dun, Barlow & Co. had called upon him, and that the statement of Dun, Barlow & Co. was as he had given it to the agent. This statement contained the following among other particulars: "A." (Avery) * * * * "claims so have $20,000 in the business, all his means, and furnished by him." Eaton testified that he received this statement or report about the 1st of September, and that the principal item of goods was sold on the 14th of September. He personally negotiated the sale. That the order was talked over some time previous to its being given, and during that time he got Dun, Barlow & Co.'s report. He also testified that he relied entirely upon that report; that after the sale and before the delivery of the goods, the treasurer of the company, Mr. Cole, demurred to the sale, fearing that Avery & Riggins were not responsible, but the witness produced Dun, Barlow & Co.'s report, and Cole admitted that under such a statement they could not consistently refuse them the credit.

This evidence is substantially corroborated by Mr. Cole. The sale and delivery of the goods was shown, and only a portion of the price was ever paid, and Avery & Riggins went into bankruptcy early in the following year.

Riggins, the partner of the defendant, testified that the defendant did not contribute any capital to the firm of Avery & Riggins, either in money or property; but he, the witness, contributed about $6,000 worth of tools, which, when Avery came with him, he rated at $4,000, of which Avery was to pay $2,000, but that he had not paid it and the firm stopped business in February, 1876.

This witness further testified that in August, 1875, the defendant said to witness that he was going down to the commercial agency, and was there going to put this property in the name and to the credit of the concern. That he afterward came back, and said he had rated the firm at $25,000.

There is much more evidence in the case. Most of the inculpatory statements contained in the testimony on the part of

the plaintiff are denied by the defendant, and there are some discrepancies in the testimony on the part of the plaintiff. These were proper matters for the consideration of the jury, but they cannot affect the question of the propriety of granting the motion for a nonsuit. The evidence above quoted being in the case, it could not be withdrawn from the jury. The making of the representations, their falsity, and the defendant's knowledge of their falsity, and that the plaintiff relied upon them, were sufficiently proved, *prima facie*, if the plaintiff's witnesses were credited. It is also clear that the defendant, when making the statements, knew that they were to be used by a mercantile agency, and the testimony of Riggins, if credited, tends to show that the defendant understood the effect of the representations, and desired to have a high rating, and also tends to establish a fraudulent intent. The jury might legitimately draw the inference that the alleged false statement of the capital of the concern was made for the purpose of giving it a credit to which it was not entitled, and of defrauding any person who might inquire of the agency, or consult its lists. That he knew that these agencies issued such lists to merchants who paid for them, appears from his own testimony, and his denial of knowledge, of the purposes for which they were issued and consulted, was not conclusive. The jury was entitled to draw its own inferences on that subject from the circumstances, notwithstanding this denial.

For these reasons we think that the motion for a nonsuit was properly denied. There are numerous exceptions to rulings on questions of the admissibility of evidence, and we have examined them all; but, without going into detail, our conclusion is that no error was committed in this respect which would justify a reversal of the judgment. The most important exception in the case is to the refusal of the judge to charge as requested, "that the jury might take into consideration whether the report made to the plaintiff by Dun, Barlow & Co., coupled with conditions and distrust in such a way as it was, was such a statement as a prudent man would rely on." The conditions and distrust here referred to, are the statement

contained in the report received by the plaintiff from Dun, Barlow & Co., following their account of what Avery had represented to them, as follows: "We do not confirm his possession of so much means as he claims, though he has had opportunities to earn it. Claims to have contract for $25,000 worth of work at profitable rates. Their claims for credit are not yet established, and for the present small amounts should rule, though so far have paid as agreed;" and appended to the report was a general caution in these words: "The information given on this sheet, in answer to your inquiry, is, you will remember, communicated in the strictest confidence, to be used as a private memorandum for your guidance in your own business, and not to be communicated to any other person or persons.

"The actual verity of this or any other information obtained through the mercantile agency is in no manner guaranteed by the said agency or the proprietors thereof, for, notwithstanding every effort, mistakes and misapprehensions may occasionally occur."

These cautions related rather to the responsibility of Dun, Barlow & Co., for the accuracy of the information which they communicated, than to that of the defendant for the truthfulness of that which he lodged with them for the purposes of their agency. Still, we think that the defendant was entitled to have the jury instructed in some form, that they might take into consideration whether the report, such as it was, was calculated to mislead a prudent man. If a refusal so to charge had stood uncorrected a serious question would have been presented. The judge, in refusing the request, expressed his own opinion that the plaintiff had the right to rely upon the statement, but immediately afterward, on the concession of the plaintiff's counsel, the judge modified his refusal and charge, and submitted the question to the jury in such an unequivocal and clear manner that they could not have misapprehended it. He charged them that if they found upon all the evidence in the case that the statement that came to the plaintiff was not a statement that was likely to deceive a prudent person, they

should find for the defendant. The form of the request which was refused, if the case stood upon that, would be subject to criticism, and we think that the charge as made gave the defendant the full benefit of the point at which he was aiming.

The other exceptions have already been sufficiently covered; we find none which in our judgment should be sustained.

The judgment should be affirmed.

All concur.

Judgment affirmed.

EMELINE PECKHAM, Appellant, *v.* CORNELIUS D. VAN WAGENEN, Respondent.

Where a stockholder receives from a corporation dividends declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated.

It seems that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company.

He cannot follow the assets of the company in the hands of parties to whom it has paid them, until at least he has established his rights as a creditor of the company and has exhausted his legal remedies against it.

LeRoy v. *Globe Ins. Co.* (2 Edw. Ch. 657), *In re LeBlanc* (75 N. Y. 598), distinguished.

(Argued November 8, 1880; decided November 30, 1880.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 19, 1879, affirming a judgment in favor of defendant, which was entered upon an order dismissing the complaint on trial. (Reported below, 13 J. & S. 328.)

The nature of the action and the facts are set forth sufficiently in the opinion.

Statement of case.

Henry L. Burnett for appellant. Plaintiff, being a stockholder, was entitled to share equally in the dividend with the other stockholders. (*Jones* v. *Terre Haute & Richmond R. R. Co.*, 57 N. Y. 196; *Luling* v. *Atlantic Mut. Ins. Co.*, 45 Barb. 510; *Harrison* v. *Mexican R. R.*, L. R. 19 Eq. 358; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y. 159, 179; *Jones* v. *T. H., etc., R. R. Co.*, 29 Barb. 353; *Foote*, appellant, 22 Pick. 299, 304; *Granger* v. *Bassett*, 98 Mass. 462; *March* v. *Eastern R. Co.*, 43 N. H. 515; *Phelps* v. *Farmers' Bank*, 26 Conn. 269; *Reese* v. *Bank, etc.*, 31 Penn. St. 78; *Rider* v. *Alton, etc., R. R. Co.*, 13 Ill. 516, 520.) As soon as the dividend was declared, plaintiff's proportionate share became absolutely her own property. (*Jones* v. *Terre H., etc., R. R.*, 57 N. Y. 195, 207; *Hyatt* v. *Allen*, 56 id. 553, 557; *King* v. *Paterson, etc., R. R. Co.*, 29 N. J. L. 82; *Carpenter* v. *N. Y. & N. H. R. R.*, 5 Abb. Pr. 277; *Hill* v. *Newichawanick Co.*, 8 Hun, 459; *Beers* v. *Bridgeport Spring Co.*, 42 Conn. 17; *March* v. *Eastern R. R. Co.*, 43 N. H. 515; *Le Roy* v. *Globe Ins. Co.*, 2 Edw. Ch. 657; *Matter of Le Blanc*, 14 Hun, 8; 75 N. Y. 598; *Lowene* v. *Fire Ins. Co.*, 6 Paige, 482; *King* v. *Paterson, etc., R. R.*, 29 N. J. L. 88; *Hodsdon* v. *Copeland*, 16 Me. 314.) An action at law will lie against defendant for the recovery of plaintiff's property received by him. (*Kane* v. *Bloodgood*, 7 Johns. Ch. 90; *King* v. *Paterson, etc., R. R. Co.*, 29 N. J. L. 506; *Le Roy* v. *Globe Ins. Co.*, 2 Edw. Ch. 651; *Matter of Le Blanc*, 14 Hun, 8; *S. C.*, 75 N. Y. 598; *Moses* v. *Macfarlan*, 2 Burr, 1010; *Eddy* v. *Smith*, 13 Wend. 489; *Buel* v. *Boughton*, 2 Den. 91; *Barnes* v. *Johnson*, 84 Ill. 95; *Hathaway* v. *Town of C.*, 62 N. Y. 447; *Causidiere* v. *Beers*, 1 Abb. Ct. App. Dec. 333, 336; *Mason* v. *Waite*, 17 Mass. 563; *Pierce* v. *Craft*, 12 Johns. 90; *Cary* v. *Curtis*, 3 How. [U. S.] 247; *Tugman* v. *Nat'l Stshp. Co.*, 76 N. Y. 207, 210; *Ela* v. *Express Co.*, 29 Wis. 611; *Knapp* v. *Hobbs*, 50 N. H. 476; *Platt* v. *Stout*, 14 Abb. Pr. 178; *Johnson* v. *First Nat'l Bank*, 6 Hun, 124; 68 N. Y. 616; *Hodsdon* v. *Copeland*, 16 Me. 314.) Plaintiff may recover of defendant damages for the wrongful detention of her property.

(*Boyce* v. *Brockway*, 31 N. Y. 490, 493; *Cobb* v. *Dows*, 9 Barb. 242; *Carver* v. *Creque*, 48 N. Y. 385.) The question of defendant's knowledge of plaintiff's rights cannot affect her right to recover. (*Van Schaick* v. *Niagara F. Ins. Co.*, 68 N. Y. 434; *Bk. of U. S.* v. *Davis*, 2 Hill, 452; *The Distilled Spirits*, 11 Wall. 356, 366.) It was error to dismiss the complaint upon the ground that the corporation, or the other stockholders, should have been joined as parties defendant. (Code of Civil Proc., § 499; *Palmer* v. *Davis*, 28 N. Y. 242; *Fox* v. *Moyer*, 54 id. 125; *Van Deusen* v. *Young*, 29 Barb. 9; *Abbe* v. *Clark*, 31 id. 238; *Leavitt* v. *Fisher*, 4 Duer, 1.)

John E. Burrill for respondent. Even if plaintiff was a stockholder, and entitled as such to dividends, still this gave her no right to recover from the defendant any of the dividends received by him on his stock, even if they were in excess of what he was rightfully entitled to receive. (*French* v. *Fuller*, 23 Pick. 108; *Patrick* v. *Metcalf*, 37 N. Y. 332; *Butterworth* v. *Gould*, 41 id. 450; *Decker* v. *Saltsman*, 59 id. 275; *Hathaway* v. *Tison*, 54 id. 655; *Hodsdon* v. *Copeland*, 16 Me. 314; *Smith* v. *Poor*, 40 id. 415; *Gardiner* v. *Pollard*, 10 Bosw. 674, 693; *Heath* v. *Erie Co.*, 8 Blatchf. 393; *Robinson* v. *Smith*, 3 Paige, 222; *Smith* v. *Hurd*, 12 Metc. 371; *Abbott* v. *Merriam*, 8 Cush. 588; *Allen* v. *Curtise*, 26 Conn. 457.) Until plaintiff had, in a proper action, enforced her claim to be a stockholder, and compelled the corporation to admit her, she could not enforce rights peculiar to stockholders, especially as against third persons, acknowledged and admitted by the corporation to be stockholders. (*Heath* v. *Erie Co.*, 8 Blatchf. 348; *B'k of Commerce's Appeal*, 73 Penn. St. 59.)

RAPALLO, J. The plaintiff claimed that she was entitled to thirty shares of $100 each, of the capital stock of the New York & Fort Lee Railroad Company, by virtue of a payment of $3,000 made by her on the 6th of November, 1863, to the treasurer *pro tem.* of the company, upon which payment such treasurer delivered to her a certificate to the effect that she had

subscribed for said shares and had paid $3,000 therefor, and would thereby be entitled to said shares on complying with the conditions of the charter, which certificate had been lost. No certificate of the stock had ever been issued to her, but, on the contrary, her demand for one was not complied with, nor was it shown that she was credited with the shares on the stock ledger of the company.

In December, 1871, there was received by the company a large amount in cash and securities for a lease of its road. A resolution was, on the 15th of December, 1871, adopted by the board of directors authorizing a dividend of the cash which had been so received among the stockholders of the company, and on the 19th of December, 1871, a further resolution was adopted authorizing the division of the securities *pro rata* among such stockholders.

The plaintiff claimed that in paying the cash dividend, and in distributing the securities, the company ignored her rights as a stockholder, and paid the whole of the cash dividend, and distributed all the securities, to and among other persons who assumed to own and hold all of the capital stock of the company, whereby they received a larger proportion of said dividends than that to which they would have been entitled if the shares claimed by her had been taken into the account. That in this way the defendant, who was one of the shareholders recognized by the company, received a dividend upon his shares exceeding by the sum of $14,000 and upwards, in cash and securities, the proportion to which he would have been entitled had the plaintiff's shares participated, and that she was entitled to recover this sum of the defendant as money had and received to her use.

The defendant disputed the claim of the plaintiff to the shares in question, claiming that they were the same which had been surrendered long before the making of the dividends, and moved for a nonsuit on the ground that the plaintiff had shown no title to the shares claimed by her; also on the ground that even if she had shown herself entitled to the shares, this action could not be maintained. The court dismissed the complaint

without specifying upon which of these grounds it based its decision.

We are of opinion that the complaint was properly dismissed on the second ground stated, and it is, therefore, not necessary to consider whether enough was shown to require the submission to the jury of the question of the plaintiff's ownership of the shares. The defendant, in receiving the dividends paid to him, did not act, or assume to act, in behalf of the plaintiff, or to represent the shares claimed by her, or to receive any dividends payable thereon. He received only the dividends declared and admitted by the company to be due him on his own shares, his title to which shares is not disputed, and in which the plaintiff claims no interest. The amount which he received was paid to him in his own right and was conceded by the company to be due to him. There was no privity between him and the plaintiff. The complaint alleges that the company, in making the dividend and distributing the securities, disregarded and ignored the rights of the plaintiff. Her remedy, if she was wrongfully excluded from the rights of a stockholder, was against the company, and she was not entitled to follow the assets of the company into the hands of parties to whom it had made payments, and to recover her dividends from them, until, at least, she had established her right as a creditor of the company, and exhausted her legal remedies against it. She could not, in the first instance, resort to a common-law action against the persons whom the company had recognized as its only stockholders, to recover a portion of the dividends admitted to be due and actually paid to them in their own right, and try her title to the shares in actions against them. As an action for money had and received, the case falls directly within the principle of *Butterworth* v. *Gould* (41 N. Y. 450), even if the plaintiff had established a clear legal title to the shares, and a right of action against the company for the dividends thereon. The defendant received the dividends, claiming them as his own, and under no pretense of authority from the plaintiff, and the payment was made to him in recognition of his title thereto as his own, and did not pur-

port to discharge the company from its liability, if any, to the plaintiff, and the case cited as well as the prior case of *Patrick* v. *Metcalf* (37 N. Y. 332) holds in express terms that under such circumstances there is no trust and no implied promise to pay the money to the plaintiff. It cannot be said that the title to the money or securities distributed was in the plaintiff, for, in the first place, she was not an admitted stockholder of the company; but if she had been, she had no title to the assets which would enable her to follow them into the hands of third persons. The title to them was in the corporation until they were distributed, and then it passed to the distributees. If she has any claim it is against the company for not setting off to her the proportion to which she claims to have been entitled, or for not recognizing her as a stockholder. There is no precedent for an action like the present, though there have been many cases in which corporations have wrongfully refused to recognize the rights of persons claiming to be stockholders. If the plaintiff had been an admitted stockholder and a dividend had been declared upon her shares with the others, and the amount of the dividend had been placed in the hands of a third party for distribution, the case would be within some of the authorities cited, in which it was held that a trust was created in favor of the stockholder to whom the dividends were due, and that they could follow the fund in the hands of the party who had thus received it, or his transferee. (*LeRoy* v. *Globe Ins. Co.*, 2 Edw. Ch. 657; *In re LeBlanc*, 75 N. Y. 598.) But the distinction between those cases and the present is very clear. The company does not appear to have declared any dividend upon the shares claimed by the plaintiff, nor to have paid any thing to the defendant as a dividend upon those shares, or for the purpose of being paid to the holder of such shares, but, as alleged in the complaint, to have ignored that the shares were outstanding, and the claim of the plaintiff thereto.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

FREDERICK GEIB, Appellant, *v.* JOHN TOPPING, Respondent.

The Supreme Court has no power to grant an order, on application of the referee in an action, requiring the plaintiff to pay the referee's fees and take up the report.

It seems that as referees act voluntarily, their rights are to be enforced according to the principle of the law of contracts.

It seems, also, that a referee is not bound to part with his report without payment of his legal fees, and when he has his report ready within the statutory time and offers to deliver it on payment of such fees, the offer will be deemed a sufficient delivery to prevent a forfeiture of fees declared by section 1019 of the Code of Civil Procedure.

Fischer v. *Raab* (56 How. Pr. 218), *S. C.* (58 id. 221), *Adams* v. *Hopkins* (5 Johns. 252), *Ousterhout* v. *Day* (9 id. 114), distinguished.

(Submitted November 9, 1880; decided November 30, 1880.)

APPEAL from order of the General Term of the Superior Court of the city of Buffalo, made June 14, 1880, affirming an order of Special Term. Said order was granted on motion of a referee appointed in this action, and directed the plaintiff to take up said referee's report, and pay to him his fees within twenty days, etc.

Frederick R. March for appellant. A notice pursuant to the Code of Procedure, if no stipulation of waiver is entered into, is all that is required to end a reference. (*Ballou* v. *Parsons*, 55 N. Y. 673.) The referee forfeits his fees if he fails to deliver his report within sixty days from the time the action is finally submitted, if any steps are taken by either party indicating a desire to proceed as though no reference had been ordered. (26 How. Pr. 164, 409; Code of Civil Proc., § 1019.) A report made after notice to end the reference is irregular, and will be set aside on motion. (*Livingston* v. *Gidney*, 25 How. Pr. 1, 7; *Litch* v. *Brotherson*, id. 407.) When the referee neglects to either file or deliver his report pursuant to statute, and either party serves a notice as required by section 1019 of the Code of Civil Procedure, the

action must proceed as if the reference had not been directed. (*Niles* v. *Maynard*, 28 How. Pr. 390; *Gregory* v. *Corrydon*, 10 Abb. [N. S.] 289.)

George Wing for respondent. The notice served by defendant's attorney upon the attorney for the appellant, notifying him that he elects to end the reference, was ineffectual for that purpose, the referee having made and signed his report within the sixty days given him by statute. (*Quackenbush* v. *Johnson*, 55 How. Pr. 94; *Waters* v. *Shepard*, 14 Hun, 223.) The referee has a lien upon the report, and cannot be compelled to deliver it until his fees are paid. (*Ott* v. *Schroeppel*, 3 Barb. 63; *Fisher* v. *Raab*, 58 How. Pr. 227.)

RAPALLO, J. We are of opinion that the court below had no power to make the order requiring the plaintiff to pay the referee's fees and take up the report. We find no authority holding that, on a summary application made by a person not a party to the action, the court can order one of the parties to pay him a sum of money for services rendered in the action. The only authority cited by the appellant is *Fischer* v. *Raab* (56 How. Pr. 218, and 58 id. 221). In that case it was one of the terms of the order granting the reference, assented to by the party applying for it, that in a certain event he should pay the referee's fees. That event having occurred, the court ordered him to perform the previous order, to which he had assented, or be attached for contempt. The order was reversed in this court on the ground that the non-payment of the money was not a contempt for which a party could be imprisoned. The power to order the payment was not passed upon, but if it had been discussed, would have presented a different question from that raised on this appeal. The order in that case simply required the party to comply with terms which had, with his assent, been imposed upon him by a previous order, as a condition of obtaining relief for which he applied to the court, and the motion was made by a party to the action. The present case contains no such feature. It was a compulsory order to

which the party had not assented and was, in effect, a summary judgment without action, founded on the implied obligation of the plaintiff to pay the referee for his services. Although the referee may be regarded, in some respects, as an officer of the court, we are not aware that it has ever been the practice to proceed in this summary manner to enforce payment of the fees of the clerk, sheriff, stenographer or referee rendering services in a litigation. We find no precedent for such a proceeding. In the cases in which it was determined that an attorney was liable to the sheriff for his fees, the question arose in actions of assumpsit by the sheriff against the attorney. (*Adams* v. *Hopkins*, 5 Johns. 252; *Ousterhout* v. *Day*, 9 id. 114.) In *Judson* v. *Gray* (11 N. Y. 408) it was decided that referees do not belong to the class of officers to whom attorneys are liable for services in the suit. In that case the referee brought his action against the attorney. In *Perkins* v. *Taylor* (19 Abb. Pr. 146, 148), ROBERTSON, Ch. J., says: That it could hardly be maintained that a referee could apply for process of contempt against a party to compel payment of his fees. That his protection lay in refusing the reference if the parties were not responsible, or in enforcing payment by action if they were, and this we regard as the correct view. Referees are not bound to serve, but act voluntarily, and their rights are to be enforced according to the principles of the law of contracts.

The referee undoubtedly was not bound to part with the report without payment of his legal fees, and where a referee has his report ready within the statutory time and offers to deliver it on payment of his legal fees, such offer should, we think, be deemed a sufficient delivery to prevent the forfeiture of fees declared by section 1019 of the Code of Civil Procedure. (*Waters* v. *Shepherd*, 14 Hun, 223.) Where the non-delivery or non-filing of the report is caused by an illegal demand of excessive fees, and brings about a termination of the reference by notice, it is a serious question whether the referee should not justly lose his fees, though perhaps the better practice would be to tender the legal fees or demand that they be taxed. These questions, however, need not now be definitely

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decided as the order of the General Term must be reversed on the ground of want of power of the Special Term to make the order for payment.

Orders of General and Special Terms reversed, without costs.

All concur.

Orders reversed.

JOHN H. BERGEN, Appellant, *v.* HONORA URBAHN, Executrix, etc., et al., Respondents.

Where in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defense of payment is interposed, the non-production of the bond by the plaintiff is evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover.

Goodhue* v. *Berrien **(2 Sandf. Ch. 630), distinguished.**

(Submitted November 10, 1880; argued November 30, 1880.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 13, 1879, which affirmed a judgment in favor of defendants, entered upon a decision of the court entered at Special Term.

This was an action to foreclose a mortgage. The material facts appear in the opinion.

John H. Bergen, appellant in person. The mortgage is equally good with or without a bond, and plaintiff is entitled to a decree of foreclosure, whether a bond exists or not. (*Goodhue* v. *Berrien*, 2 Sandf. Ch. 630.)

James Eschwege for respondents. The bond being absent, the mortgage will be presumed to have been paid. (*Bauder* v. *Snyder*, 5 Barb. 63; *Flagg* v. *Ruder*, 1 Bradf. 193.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. Whether we take the pleadings as they are set forth in the record, or as they would have been if actually amended in pursuance of the order of the trial judge, can make no difference with the result. In either case the plaintiff failed to make out a cause of action. The complaint sets out a bond and mortgage, and alleges default in the payment of the sum secured thereby. The court allowed the plaintiff to amend that pleading "by striking out all the allegations as to a bond and setting forth the mortgage produced in evidence; whereupon," as the case states, "defendants, by leave of the court, amended the answer by setting up payment of this mortgage." No formal amendment of either pleading seems to have been made; yet evidence of payment was offered, and, although objected to, it was not upon the ground that such issue was not within the pleadings, and it is now too late to raise that question. (*Voorhees* v. *Burchard*, 55 N. Y. 98.)

The learned trial judge came to the conclusion that the defense was made out; the judges of the General Term were of the same opinion; and we think the evidence permits no other. Upon the plaintiff's own showing he was not entitled to recover. It was provided that the mortgage should "cease, determine and be void" upon the "payment of the money mentioned in the condition of the bond" referred to in the mortgage; the covenant recited was, that the money should be paid, "as mentioned and expressed in the condition of the bond," and it is only upon default in such payment that the mortgage can be enforced. The plaintiff closed his case without producing the bond or accounting for its absence, and thereupon the record states, the "defendant called for the production of the bond recited in the mortgage, which plaintiff failed to produce, stating that it was not in his possession." It is apparent, from the terms of the mortgage, that the bond was the principal thing, and the mortgage a mere incident. If the bond had been paid, the mortgage was of no avail; if it had been transferred, it carried with it the security afforded by the mortgage, and when the plaintiff admitted that it was not in his possession, and said nothing in explanation of his

failure to produce it, the trial need have gone no further. For as well by the allegations in the complaint, the recital in the mortgage, and the admission of the plaintiff, there was originally a bond, but which, as to him, must be deemed to have been canceled, and the main fact of indebtedness was therefore unproven. The learned counsel for the appellant now contends, however, that "the mortgage is equally good with or without a bond; that in either case he is entitled to a decree of foreclosure," and in support of this position cites the case of *Goodhue* v. *Berrien* (2 Sandf. Ch. 630). It is inapplicable; there the mortgage was given to secure sundry liabilities incurred for the mortgagor. This appeared by its terms; and although it also referred to a bond it was proven that no bond was in fact given. The case now in hand contains neither of these facts, and is therefore subject to the rule which makes the non-production of the bond referred to in the mortgage evidence of the non-existence or discharge of the mortgage debt, and when unexplained is conclusive against the plaintiff's right to recover. (*Jackson* v. *Willard*, 4 Johns. 43; *Langdon* v. *Buel*, 9 Wend. 80; *Merritt* v. *Bartholick*, 36 N. Y. 44.) Other circumstances appearing in evidence, and leading to the same conclusion, are considered by the learned judges of the court below and need not be repeated.

The judgment should be affirmed.

All concur.

Judgment affirmed.

THE NATIONAL BANK OF NEWBURGH, Respondent, *v.* JAMES BIGLER et al., Appellants.

A mortgage was executed to M. and S., who were copartners, doing business under the firm name of M. & Co. It was expressed in the condition of the mortgage that it was intended among other things, "as a continuing security and indemnity" to the mortgagees "for and against all liabilities they then had incurred or might thereafter incur as indorsers, acceptors or sureties in any form," for J. B., one of the mortgagors, or

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the firm of J. B. & Co. *Held*, that the mortgage included not merely such liabilities as were incurred by the mortgagees jointly as copartners, but such as were incurred by either of them, separately and individually.

After the delivery of the mortgage M. died; by the articles of copartnership it was stipulated that in case of the death of one of the partners, the survivor should continue to carry on the business for the benefit of both parties, for a time specified after such death. *Held*, that the authority thus conferred, if valid and operative (as to which *quære*), did not authorize the survivor to bind the estate of the deceased by new accommodation indorsements, nor did it permit and make valid an indorsement of the firm executed by the survivor as a renewal of an indorsement made in the life-time of the deceased, and with his assent.

At the time of the death of M. plaintiff held the paper of J. B. & Co., indorsed by M. & Co. to a large amount. Upon the request of B. & Co. and with the concurrence of S. and the assent of the executors of M., an arrangement was made to the effect that the mortgage should be assigned to plaintiff, that the paper held by the latter should be protested at maturity, and as each note matured, J. B. & Co. should make a new note for the same amount, to be indorsed by S. and discounted by plaintiff, the proceeds to be credited to S., and therewith he was then to take up the old note and pledge it to plaintiff as security for the new one; it being the intention of the parties, as the court found, that the paper so held at the death of M. was not to be paid or extinguished, but kept alive against all the parties. This arrangement was carried out. *Held*, that it did not operate as a payment of the notes secured by the mortgage; that no presumption of payment arose from the taking of the renewal notes; also that the assignment transferred to plaintiff the right to enforce the mortgage security.

It seems, that plaintiff, had there been no agreement, would have been equitably entitled to an assignment of the mortgage.

Also, *held*, that the mortgage was not one of indemnity merely, but was a security as well, against all liabilities, and that, therefore, it was not essential to a recovery to show that damages had been sustained; that the right of the mortgagees to resort to the security arose when their liability, as indorsers, was fixed.

The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out.

Some drafts drawn by J. B. & Co. and indorsed by M. & Co., before the death of M., were taken up with the proceeds of new drafts, indorsed by S., and discounted by plaintiff, who received the old drafts in pledge under the agreement. *Held*, that the transactions were renewals, not payments, and that at least the liability of S. on the new paper was sufficient to make the mortgage available to the plaintiff as security therefor.

It seems, that the right of a debtor making a payment to direct upon which

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one of several distinct liabilities or demands, *held*, by his creditor, it shall be applied, must be exercised at the time of payment; if he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the creditor and he may apply it as he chooses.

So, where the debtor assigns property as collateral security generally without dictating upon what demand its proceeds shall be applied, he cannot bind the creditor by any subsequent direction, but the latter may apply such proceeds to any of the demands held by him which are due at the time the money is received.

Defendant M. A. B. who owned an undivided interest in the mortgaged premises joined in the mortgage as security for J. B. & Co.; it was claimed on her behalf that the arrangement with the plaintiff for renewals operated as an extension of the time of payment; that after the death of M. no effectual consent to an extension, binding the firm of M. & Co., could be given, and that thereby the liability of M. & Co. was released. *Held*, untenable, as no valid agreement extending the time of payment of the original notes was shown.

Where, in an agreement for an extension of the time of payment made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby.

(Argued November 10, 1880; decided November 30, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made July 18, 1879, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Mem. of decision below, 18 Hun, 400.)

This action was brought to foreclose a mortgage.

The material facts appear in the opinion

Theodore F. Miller for appellants. The dissolution of the partnership of David Moore & Co. by the death of Moore put an end to the authority of the survivor to bind the firm by any new engagement. (*Van Keuren* v. *Parmelee*, 2 N. Y. 524, 533; *Natl. Bk.* v. *Norton*, 1 Hill, 572; *Millard* v. *Thorne*, 56 N. Y. 402; *Bloodgood* v. *Bruen*, 8 id. 362; Collyer on Part., p. 170, note 3; *Powell* v. *Smith*, 8 Johns. 250; *Witherby* v. *Mann*, 11 id. 518; *Rodman* v. *Hedden*, 10 Wend. 498; *Howe* v. *Buff., N. Y. & Erie R. R.*, 37 N. Y. 297; *Doolittle*

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v. *Dwight*, 2 Metc. 561; *Lee* v. *Clark*, 1 Hill, 56; *Drake* v. *Porter*, 13 Hun, 662; *Rector, etc.*, v. *Higgins*, 48 N. Y. 537; *Barnard* v. *Campbell*, 55 id. 456, 464.) The law, in the absence of directions, applies a general payment, so as to release a security. (*Dows* v. *Moorewood*, 10 Barb. 183.) A debtor who pays money to a creditor has the right to direct how the payment shall be applied. (*Hall* v. *Constant*, 2 Hall, 209; *Stone* v. *Seymour*, 15 Wend. 19; 19 id. 19; 9 Wheat. 720; *Pattison* v. *Hall*, 9 Cow. 747; *Sheppard* v. *Steele*, 43 N. Y. 61; *Matthews* v. *Sheehan*, 69 id. 585, 590; *Wheeler* v. *Newbould*, 16 id. 392, 398.) A surety to a surety, so far as the creditor is concerned, has all the rights of a surety. (*N. Y. State Bk.* v. *Fletcher*, 5 Wend. 89.) The contract of a surety is strictly construed in his favor, and will not be extended to a case not clearly within its terms, and the bank's dealings clearly released this defendant. (*Moore* v. *Paine*, 12 Wend. 123; *Grant* v. *Smith*, 46 N. Y. 96; *Ducker* v. *Rapp*, 67 id. 464; *Bush* v. *Lathrop*, 22 id. 535.) Plaintiff having assented to an extension of the time of payment to the principal debtors of the whole of their debt after the death of David Moore, this, in the absence of any person authorized or competent to represent him, discharged his estate, and the liability of David Moore & Co. as a firm. (*Place* v. *McIlwain*, 38 N. Y. 99; *Putnam* v. *Lewis*, 8 Johns. 382; *Myers* v. *Willey*, 5 Hill, 463; *Fellows* v. *Prentiss*, 3 Denio, 518; *Bangs* v. *Mosher*, 23 Barb. 478; *Fisher* v. *Marvin*, 27 id. 159; *Hubbard* v. *Gurney*, 64 N. Y. 466; *Calvo* v. *Davies*, 73 id. 211.) After the death of David Moore, his representatives became *quasi* sureties to the plaintiff Stevens. (*Cosgrove* v. *Tallman*, 67 N. Y. 95; *Nat'l Bk.* v. *Norton*, 1 Hill, 572; Story on Partnership, § 343; Parsons on Partnership, 352.)

E. A. Brewster for plaintiff, respondent. Taking a new note, even that of a third person, is not payment of a pre-existing debt, unless so intended. Where the intention to keep the original debt alive appears affirmatively, such intention must prevail over any presumption arising out of any changes in the

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notes or other evidences of the debt. (*Tobey* v. *Barber*, 5 Johns. 68; *Highland Bk.* v. *Dubois*, 5 Denio, 558; *Noel* v. *Murray*, 13 N. Y. 167; *Hill* v. *Beebe*, id. 556; *Bates* v. *Rosecrans*, 37 id. 410; *Jagger Iron Co.* v. *Walker*, 76 id. 521; *Feldman* v. *Beier*, 78 id. 298.) Taking new notes for the mortgage debt did not discharge the mortgage. When the new paper falls due and is not paid, the creditor may resort to the mortgage which was given for the original debt. (*Chapman* v. *Jenkins*, 31 Barb. 164; *Pond* v. *Clark*, 14 Conn. 334; *Crosby* v. *Crafts*, 5 Hun, 327; 69 N. Y. 607; *Nightingale* v. *Chaffee*, 11 R. I. 609; *S. C.*, 23 Am. Rep. 531.) The case is the same in substance and principle as if the mortgage had been made directly to the plaintiff, upon the familiar principle of equity that the creditor is entitled to all the securities given by the principal debtor to his surety. (*Vail* v. *Foster*, 4 Comst. 312; *Curtis* v. *Tyler*, 9 Paige, 432, note, p. 435; *Moore* v. *Paine*, 12 Wend. 123; *Crosby* v. *Crafts*, 5 Hun, 327; 69 N. Y. 607.) The indorsement of Stevens individually upon the notes of Bigler, after the death of Moore, for the purpose of protecting the indorsements of D. Moore & Co., were within the scope and intent of the indemnity of the mortgage in question. (*Hill* v. *Packard*, 5 Wend. 376; *Buffalo City Bk.* v. *Howard*, 35 N. Y. 500; *Staats* v. *Howlett*, 4 Denio, 559, 566; Collyer on Partnership, § 345.) The right of a debtor making a payment, to direct the application of such payment, must be exercised at the time the payment is made. (Am. Lead. Cas. 294; *Field* v. *Holland*, 6 Cranch, 8; *Harding* v. *Tifft*, 75 N. Y. 461; *Allen* v. *Culver*, 3 Denio, 284.)

A. S. Cassedy for defendant, respondent. Sureties are entitled to the benefit of all securities which may have been taken by any one of them to indemnify himself against their joint liabilities for their principal. The security taken by one inures to the benefit of all. (*Elwood* v. *Dezendorf*, 5 Barb. 398; *Hill* v. *Packard*, 5 Wend. 376.) A creditor shall have the benefit of any collateral securities which the principal debtor has given to the surety, or person standing in the situation of

surety, for his indemnity. (*Maure* v. *Harrison*, 1 Eq. Cas. Abr. 73; *Curtis* v. *Tyler*, 9 Paige, 432; *Wright* v. *Morley*, 11 Ves. 22; *Bk. of Auburn* v. *Thorp*, 18 Johns. 505; 4 Kent, 307 [6th ed.]; 1 Story's Equity, §§ 502, 638; *Crosby* v. *Crafts*, 12 N.Y. Sup. Ct. [Hun] 327; 4 N. Y. 312; 7 Paige, 627; 3 Sandf. Ch. 428; 9 Paige, 432; *Bank* v. *Douglas*, 4 Watts [Pa.], 95.)

FINCH, J. The mortgage, which is the subject of the present controversy, was given by the defendants, James Bigler and wife, and Mary Augusta Bigler, to David Moore and Halsey R. Stevens. The latter were copartners, doing business under the name of David Moore & Co. The condition of the mortgage expresses that it was intended as a continuing security to said David Moore and Halsey R. Stevens, for all present or future indebtedness of James Bigler, or J. Bigler & Co. to them, and as a continuing security and indemnity to said David Moore and Halsey R. Stevens, for and against all liabilities they then had incurred, or might thereafter incur, as indorsers, acceptors, or sureties, in any form, for the said James Bigler, or J. Bigler & Co. The General Term held that the security thus provided extended not merely to such liabilities as were incurred by the two mortgagees jointly and as partners constituting the firm of David Moore & Co., but also to such as were incurred by either Moore or Stevens, separately and individually. We accept that construction as correct. If the intention had been to limit the protection to the partnership solely, the mortgage would naturally have been given to David Moore & Co. But the partnership name is entirely omitted, and this omission, at a time when all the liability incurred by the indorsers was that of the firm, indicates strongly a purpose to extend the security beyond the partnership, and far enough to embrace its individual members. Protection, too, was to be secured to the mortgagees against liability incurred for Bigler & Co. in "any form," and that broad phrase is significant of an intention to shield both of the mortgagees in whatever form or manner,

and whether as joint or several promisors they became liable for the debts of the maker of the mortgage. The language chosen is not necessarily restricted to joint liabilities. The conjunction "and" bends always to the manifest intention, and may even be replaced by the disjunctive "or." Then, too, the mortgage was to be a "continuing" security, and, therefore, presumably intended to reach and cover the possible emergency of the death of one of the mortgagees and a separate liability of the survivor. The evident purpose on both sides was to provide for complete and full security to the mortgagees against liabilities incurred by either as well as by both, and such evident intention must prevail where not necessarily opposed and contradicted by inflexible terms, pointing to a different purpose.

Some time after the execution and delivery of the mortgage, and on the 9th of September, 1877, David Moore died. The contingency of a dissolution of the partnership by the death of one of its members was, to a certain extent, foreseen and provided for in the articles of partnership. It was stipulated that in such event the surviving partner should continue to carry on the business for the benefit of both parties until the first day of February next ensuing after the decease of either. It is perhaps not necessary to determine fully the scope or validity of this provision. The doubt expressed in *Ross* v. *Hardin* (79 N. Y. 85), as to how far a person may contract for the care of his property after his death, need not be solved in this case. The contract here was certainly intended, in some degree, to supplant and modify the legal rules which restrain the action of the survivor. To carry on the business, involved, of necessity, the right to contract to a needful extent new liabilities and to make new agreements, plainly within the ordinary scope of the business and essential to its successful management. But the authority thus conferred, if held to be operative, would not authorize the survivor to bind the estate of the deceased partner by new accommodation indorsements, because such would be outside of the business and beyond its scope, and dependent upon a consent which could no longer be given.

And even as to indorsements of that character, existing prior to the dissolution by the death of Moore, and made in his lifetime with his assent, we are not prepared to say that the authority of the articles would permit renewals, and make valid an indorsement of the firm executed by the survivor; and this for the reason that, if David Moore had lived, the renewal indorsements would have required his sanction, because beyond the scope of the partnership business. To such transactions the authority did not, by its terms, extend, and the consent necessary to justify them as partnership obligations was rendered impossible by the death of Moore. The rights of the plaintiff, therefore, cannot be upheld by the argument on its behalf, drawn from the peculiar provisions of the articles of partnership.

At the date of David Moore's death the Bank of Newburgh held the paper of J. Bigler & Co., indorsed by David Moore & Co., to the amount of $91,500, soon to mature. It was evident that the pressure of this large indebtedness, if it should fall upon the debtor firms at once, would crush them both. Bigler & Co. had a large claim against the city of New York, to which they looked as a resource for the payment of the debt. But help from that direction could only come slowly, and would require time. The creditor bank was willing to grant delay, but doubtful of the safety of such action, and fearful, with the timidity of capital, of legal questions and complications. But upon the request and with the concurrence of Bigler & Co. on the one hand, and Stevens, the survivor of David Moore & Co. upon the other, and with the assent of the executors of Moore, an arrangement was made, out of which grows the first serious question on this appeal.

That arrangement was in substance, that the mortgage given by the Biglers to David Moore and Halsey Stevens should be assigned by the latter, and the executors of the former to the Bank of Newburgh; that the paper held by the bank should be protested at maturity, and the liability of the indorsers fixed; thereupon, as each note matured, Bigler & Co. were to make a new note of the same amount, Stevens was to indorse

it, the bank to discount it, crediting the proceeds to him, and with such proceeds he was then to take up the old note, and pledge it to the bank as security for the new paper discounted. This plan was carried out in detail except, perhaps, as to some paper which may require separate consideration.

It is claimed by the appellants that this arrangement operated as a payment of the notes secured by the mortgage, and the bank, therefore, had no right to foreclose.

There are several satisfactory answers to such a view of the transaction. The trial judge has found, as a fact, that it was the intention of all parties to the transaction, that the notes and drafts held by the bank at the death of Moore were not to be paid or extinguished, but were to be kept alive against all the parties thereto. The evidence abundantly sustains this finding. In the face of such a fact no presumption of payment can flow from the taking of the renewal notes. (*Noel* v. *Murray*, 13 N. Y. 167; *Hill* v. *Beebe*, id. 556; *Bates* v. *Rosekrans*, 37 id. 410; *Jagger Iron Co.* v. *Walker*, 76 id. 521; *Feldman* v. *Beier*, 78 id. 298.) Indeed, not only the substance, but the form of the transaction tended to that result. When the liability of the indorsers was fixed they had the right to take up the notes and hold them, and their collateral mortgage against the makers. Just that the survivor did, and thus possessed of the notes and mortgage, and the right to enforce them against the makers, transferred all those rights to the bank. There was, therefore, no payment or discharge of the original indebtedness as against the makers of the notes, either in fact or form. Nor was there, in truth, any such discharge even of the liability of Moore & Co. That firm took up the paper with the proceeds of renewals disconnted by the bank, and whatever might be said as to the right of the survivor to make such renewals and thereby bind the partnership, it is at least certain that they did not constitute a payment which would discharge the liability of Moore & Co. The new notes indorsed by Stevens, so far from working a discharge of that liability, were merely so many broken promises to pay the debt, and it is immaterial whether they were in

truth those of the firm or of Stevens alone. In neither case did they constitute a payment. (*Jagger Iron Co.* v. *Walker*, *supra.*) If it be argued that since there was in fact no payment by Moore & Co. they could not be said, by taking up the notes, to have acquired the rights against the makers which they assumed to transfer to the plaintiff, the answer is that Bigler & Co. cannot raise the question. As to them, the original notes were taken up by the indorsers, and pledged with the collateral to the plaintiff, even though, as between the indorsers and the bank, certain equities grew out of the form of the transaction with which the makers were not concerned. But even if by a technical and arbitrary construction founded upon the form which the transaction was made to assume, it could justly be said that Moore & Co. were released from their liability to the bank, that was only so upon the condition that their collateral as an effective security should be vested in the bank, and with the entire right which they themselves had to enforce it. Such a discharge of Moore & Co. could of course work no release of the assigned security. And besides the transaction, taken as a whole, is plainly supported by the principle that the creditor is equitably entitled to hold and enforce the security held by the sureties, and may do so independently of the question whether such sureties are in fact released or not. The assignment of the mortgage to the Newburgh bank, which was the voluntary act of Stevens and the executors of Moore, merely accorded to the plaintiff its equitable right to the security held by Moore & Co. as sureties, and to the enforcement of the same. The assignors did simply what they might have been compelled to do, and the plaintiff, holding the security of the sureties, had the right to enforce it, as has been done in this action. (*Vail* v. *Foster*, 4 Comst. 312; *Curtis* v. *Tyler*, 9 Paige, 432; *Moore* v. *Paine*, 12 Wend. 123; *Crosby* v. *Crafts*, 5 Hun, 327; affirmed, 69 N. Y. 607; *Pond* v. *Clarke*, 14 Conn. 334; *Chapman* v. *Jenkins*, 31 Barb. 164; *Nightingale* v. *Chaffee*, 11 R. I. 609.) The force of this position is sought to be broken by the learned counsel for the appellants by the suggestion that the rule is

only invoked in cases where it is called for by some equitable consideration, and he examines the authorities from that standpoint. It is quite true that in most, if not all the cases, some circumstance, like the insolvency or discharge of the surety, was the occasion of applying the principle. Such circumstance added point and force to the justice of the rule, but did not furnish its reason. Its true basis is not to be found in the different and varying circumstances of the cases, but in the equitable consideration common to them all, that the securities in the hands of the sureties have been appropriated by the debtor for the payment of the debt, and constitute a trust for its better security which equity will enforce for the benefit of the creditor. (*Vail* v. *Foster*, and *Crosby* v. *Crafts*, *supra*.)

It is further argued, as an answer to plaintiff's right to foreclose, that the contract evidenced by the mortgage is one of indemnity merely, and that, as no property or assets of Moore & Co. have gone to the payment of the debt, they have suffered no damages and, therefore, cannot utilize their collateral, or authorize their assignee to do so. But the contract is not one of indemnity merely. The mortgage was made as a continuing security for all present and future indebtedness of J. Bigler, or J. Bigler & Co., and as a continuing security *and* indemnity to the mortgagees *for* and *against* all *liabilities* they have or may incur as indorsers, etc. The rule gathered from the cases is that where indemnity only is expressed, damages must first be sustained before a recovery can be had. (*Trinity Church* v. *Higgins*, 48 N. Y. 537.) But the mortgage in the present case was given as security and indemnity against all liability. The authorities on the subject are not harmonious. (*Chace* v. *Hinman*, 8 Wend. 452; *Aberdeen* v. *Blackmar*, 6 Hill, 324; *Churchill* v. *Hunt*, 3 Den. 321; *Gilbert* v. *Wiman*, 1 Comst. 550; Sedg. on Damages, 650.) In the case last cited, the conflict of opinion is said to be reconciled by keeping in view the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the non-performance of the thing specified. And the distinction is illustrated by a comparison of the conditions of the

bonds which had been subjected to judicial discussion. Where the indemnity provided is against a "charge," or "fixed legal liability," the obligee is to be saved from the thing specified, and the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform: while, on the other hand, where the covenant is for indemnity only, and against resultant damages, these must be actually suffered before an action can be maintained. The mortgage in the present case was given as security for, and indemnity against, all liabilities, then or afterward incurred, and the right of Moore & Co. to resort to their security arose the moment their liability as indorsers was fixed.

We have alluded to the fact that some paper held by the plaintiff was arranged in a manner different from the rest, and the appellants now claim that it should have been taken out of the operation of the mortgage, and that the court erred in refusing to do so.

A draft of $2,750, drawn by Bigler & Co. on Mailler & Quereau, and indorsed by Moore & Co., before the death of Moore, was held by the plaintiff, and was a part of the liability protected by the mortgage. This draft matured on the 15th of September, a few days after Moore's death, and was renewed by a new draft of Bigler & Co. on the same parties, indorsed by Stevens. When that draft, which was payable in New York, fell due, Bigler, who happened to be there, took it up to save protest, and, returning at once to Newburgh, substituted a new draft, which the plaintiff discounted. It is quite evident that this transaction was merely formal, and was adopted, under the general arrangement, as a renewal rather than a payment.

The draft of $15,000 was drawn by Bigler & Co. on Mailler & Quereau, indorsed by D. Moore & Co. and William O. Mailler & Co., and was arranged in the same way with the mass of the paper held by the bank, except that it was taken up by Mailler & Co., the last indorsers, with the proceeds of a similar renewal, and then pledged to the bank. When Mailler & Co. took up this draft the liability of Moore & Co., the prior

indorsers, remained, and was fixed by protest, and the pledge of the old acceptance to the bank preserved to the pledgee the liability of Moore & Co., and the right to the protection of the mortgage. Both of these original drafts, as well as their renewals, were produced in evidence by the plaintiff, and, in any event, the liability of Stevens upon the new paper was sufficient, under the construction we have put upon the contract, to make the mortgage available for these drafts to the plaintiff.

The defendants also claim that a payment of about $44,000 to the bank should have been applied according to the directions of Bigler & Co. The facts were, that Bigler held a judgment in May, 1876, against the city of New York, which he assigned, by an assignment absolute in form, to the extent of $50,000, to the plaintiff. The evidence shows that the assignment was intended as a general security to the bank for Bigler's indebtedness, but was delivered without any express condition, and without any direction of the assignor as to the application of its proceeds. This judgment was afterward reversed, but the litigation ended in a compromise, to which Bigler assented, by which the sum in question was received by the attorney prosecuting the proceedings, and paid over by him to the plaintiff as the owner of the claim. Before such payment Bigler formally demanded that the amount received should be applied on certain specified debts, which the bank refused, and, as matter of fact, applied some part of it, at least, upon debts of Bigler which were not within the protection of the mortgage in suit. It is the right of a debtor making a payment to dictate, when he does so, upon what distinct and separate liability or demand, held by his creditor, his payment shall be applied. And this is so because he is the sole master of the money which he proposes to pay, and has the right to extinguish with it whichever of his liabilities he prefers. In the learned and exhaustive note to the case of *Field* v. *Holland*, in 1 American Leading Cases (p. 362, *p. 294), it is said: "the principle adopted by the common law appears to be the reasonable one that the ownership of the money determines

the right of appropriation. Before the money is paid, that is, while it belongs to the debtor, he may direct any application that he pleases. * * * But if he pays the money without directing any appropriation the money becomes absolutely the property of the creditor; and being his own, he may do with it what he will." The difficulty here is, that when this money was paid to the bank it was their own money, and not Bigler's. He had no ownership or control over it, because he had long ago parted with the right to receive it. Doubtless, when he assigned the judgment as a general collateral, he might have dictated upon what demand its proceeds, when collected, should be applied. Not having done so, and having parted with his ownership without condition, he cannot dictate what the bank shall do with its own money. If property is assigned as collateral security for several debts, without direction at that time by the assignor as to the application of its proceeds, the creditor may apply the money realized to any of the notes that are due at the time the money is received. (1 Am. Lead. Cas. 341, *278; *Field* v. *Holland*, 6 Cranch, 8.) The Special Term, therefore, committed no error in refusing to disturb the application by the bank of the sum in question.

Two other elements in the case remain to be considered, and have been purposely postponed for separate discussion.

At the death of David Moore the Highland National Bank held the paper of J. Bigler & Co., indorsed by David Moore & Co., for something over $50,000. Nearly one-half of this represented paper which Bigler & Co. had given to Moore & Co. for lumber bought of the latter, and which paper the Highland Bank had discounted for Moore & Co. The remainder consisted of the notes and drafts of Bigler & Co., indorsed by David Moore & Co., for the accommodation of the makers, and discounted also by the Highland Bank. That corporation was a party to the arrangement we have described, as made with the Newburgh Bank, and by agreement the two were entitled to share in the proceeds of the mortgage in certain specified proportions. The Highland Bank, declining to join in the foreclosure of the mortgage as a party plaintiff, was,

therefore, made a party defendant, and appeared in the action setting up its rights in the proceeds of the mortgage. The only difference in the position of the Highland Bank from that of the plaintiff is found in the fact that after the death of Moore, its paper made by Bigler & Co., and bearing the indorsement of Moore & Co., was renewed by new paper of the same makers, indorsed by Stevens in the name of D. Moore & Co., except that in one instance, he added the indorsement of H. R. Stevens, surviving partner. The view we have taken of the provisions of the mortgage, as protecting each of the mortgagees as well as both, is decisive of the rights of the Highland Bank. The successive renewals in no manner paid or discharged the original debt; the bank had the right to enforce, in equity, the collateral held by Moore & Co.; and was unaffected by the question whether Stevens, as survivor, had, or had not, the right, by using the firm indorsement, to bind the estate of his deceased partner. If he had, the indorsement was that of the firm and was protected by the mortgage. If he had not, at least he bound himself and so was equally protected.

Upon the whole case, as between the banks on the one hand, and Bigler & Co., and Moore & Co. on the other, it is impossible not to see that the contract and intention of the parties have been fairly carried out and executed by the decree; and while it is possible to raise technical difficulties, yet none of them are such as to require a reversal of the justice which has been done.

There remains only the inquiry how the defendant Mary A. Bigler is affected by these transactions, and whether the judgment of foreclosure can stand as against her. She owns an undivided third part of the property covered by the mortgage, and joined in its execution at the request of her father, as security for J. Bigler & Co. It is claimed upon these facts that she is surety to the sureties of J. Bigler & Co., and has all the rights of a surety. This is, perhaps, an accurate statement of her relation to the parties but not quite of its legal

characteristics. However that may be, the argument presented in her behalf is sufficiently plain and distinct.

It is insisted that the arrangement with the Newburgh bank for renewals operated as an extension of the time of payment to the principal debtor, and thereby the liability of David Moore & Co. as a firm was released, and hence, no liability of theirs remaining, the security for such liability is discharged. It is not denied that Stevens consented, and the executors of Moore consented, but the argument is that after the death of Moore no effectual consent, binding the firm of Moore & Co., could be given. We need not consider that question, for the very foundation of the argument is wanting. No valid agreement to extend the time of payment of the original notes is shown. No such fact is found by the court, and no such request to find was made. The agreement with the banks was precisely the reverse. The old notes were protested and not extended. They were taken up by the indorsers, and the liability of the makers to them was transferred to the bank without any agreement, express or implied, for an extension of that liability. In neither of the agreements of April 2d or April 10th was there any stipulation to give additional time to the makers, and we cannot infer it from renewals which were themselves secured by the pledge of the old paper, due and unextended, and so by the understanding of the parties intended to remain. (*Cary* v. *White*, 52 N. Y. 138; *Hubbard* v. *Gurney*, 64 id. 458.) Indeed, it was an essential part of the transaction, expressly stipulated between the parties, that the banks might proceed to enforce the collateral mortgage whenever they thought best. Where the right to proceed against the surety is thus reserved, the agreement for an extension of time is held to be conditional upon the assent of the surety, and the latter is not discharged. (*Calvo* v. *Davies*, 73 N. Y. 217; *Morgan* v. *Smith*, 70 id. 545.) In no sense, therefore, can it be said that there was an extension of the time of payment to Bigler & Co. which operated to discharge Moore & Co., or affect the rights of Mary A. Bigler. If, as respects this question, there is any difference in the situation of the Highland Bank from

that of the plaintiff, we are relieved from its consideration by the concession, made on the argument, that the rights of that bank should follow and be determined by our conclusions as to the rights of the plaintiff.

There is nothing, therefore, in the position of Mary A. Bigler to change or modify our opinion as to the right of the plaintiff to its decree of foreclosure. That judgment seems to us just and not open to the objections which have been urged against it. It should, therefore, be affirmed with costs.

All concur.

Judgment affirmed.

WILLIAM CANADAY, Respondent, *v.* FRANKLIN KRUM, Appellant.

In an action to recover the amount of a check drawn by C., plaintiff's assignor, to the order of defendant, and alleged to have been delivered to the latter to be used in purchasing a draft for the drawee, the defendant averred in his answer that the check was intended as a payment in part of a claim which C. "morally owed" the defendant, growing out of a fraud perpetrated by C. in inducing defendant to take a fraudulent note; the alleged facts in reference thereto being set forth in the answer, which also averred that defendant settled the claim with C. on his promise that he would at some time pay the loss. On the trial, after L., as a witness for plaintiff, had testified that the check was given to purchase a draft, defendant's counsel sought to show by him, on cross-examination, the facts of the fraud set forth in the answer; this was objected to and the evidence excluded. After defendant, as a witness in his own behalf, had testified that the check was given as a payment upon the claim arising out of the fraudulent note, his counsel offered to prove by him the transaction in regard to said note substantially as alleged in the answer. This was objected to and excluded. Before the court ruled upon the offer it was conceded that a release under seal, which was produced, was executed by defendant with full knowledge of the facts; the release recited that in consideration of the agreement of the other parties to indemnify defendant from the debts of a firm named during the time he was a member he released C. from all demands "by way of checks, notes or otherwise." *Held*, that the evidence offered was properly rejected; that evidence of the details of the fraud could not legitimately tend to confirm defendant's version.

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The evidence upon the cross-examination of C. was also offered, for the purpose of discrediting him. *Held*, that the rejection thereof for that purpose was in the discretion of the court, and so was not error.

(Argued November 11, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made January 28, 1879, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover the amount of a check drawn by Lloyd Canaday, plaintiff's assignor, payable to the order of defendant, which the complaint alleged was delivered to him to be used to purchase a draft to be sent to the drawee, instead whereof defendant drew and retained the money. The substance of the answer and the material facts appear in the opinion.

Hobart Krum for appellant. If Lloyd Canaday paid the money to defendant on account of his moral obligation by reason of the bogus note, it was a voluntary payment and cannot be recovered back. (*Flower* v. *Lance*, 59 N. Y. 603; *Railroad Co.* v. *Marsh*, 12 id. 309; *Silliman* v. *Wing*, 7 Hill, 159; *Quincy* v. *White*, 63 N. Y. 370; *Sup'rs of Delaware Co.* v. *Foote*, 9 Hun, 527, 531; *Stafford* v. *Bacon*, 1 Hill, 530.) If the debt was discharged by operation of law, or there was a legal obstacle to its recovery, the moral obligation will support a promise. (*Bently* v. *Morse*, 14 Johns. 468; *Bridge* v. *Johnson*, 5 Wend. 349; *Goulding* v. *Davidson*, 26 N. Y. 614; *Early* v. *Mahon*, 19 Johns. 147; *Stearns* v. *Tappan*, 5 Duer, 294; *Crans* v. *Hunter*, 28 N. Y. 394.)

S. L. Mayham for respondent. The parties having reduced their agreement to writing, under seal, that is the best evidence, and, in the absence of fraud or mistake, the only evidence of what they intended. (1 Greenleaf on Evidence, §§ 86, 87; *Lament* v. *Hudson River Ins. Co.*, 17 N. Y. 199; *Erwin* v. *Saunders*, 1 Cow. 249.) The legal effect of this writing

being a release, that legal character or effect can no more be changed by parol than can its express terms. (*Thompson* v. *Ketcham*, 8 Johns. 190; *Pattison* v. *Hull*, 9 Cow. 747; *Le Farge* v. *Rickert*, 5 Wend. 187.) Parol proofs of the acts of parties, under a writing clear and unambiguous in its terms, cannot be received to control the construction of the writing. (*Norton* v. *Woodruff*, 2 N. Y. 153; *Giles* v. *Comstock*, 4 id. 270; *Clark* v. *Baird*, 9 id. 183.) A mere moral or conscientious obligation, unconnected with a prior unextinguished legal or equitable claim, is not enough to support a promise. (*Ehle* v. *Judson*, 24 Wend. 99; *Smith* v. *Ware*, 13 Johns. 257; *Goulding* v. *Davidson*, 26 N. Y. 613.) In the admission or rejection of immaterial questions upon collateral matter on the cross-examination of a witness, the judge may exercise a sound discretion, and such exercise of discretion is not the subject of review on appeal. (*Great West. Turnpike* v. *Loomis*, 32 N. Y. 127; *Ward* v. *The People*, 3 Hill, 395; 6 id. 144–146; *La Beau* v. *The People*, 34 N. Y. 223.) The offer to prove a parol contemporaneous agreement at the time of the execution of the written release in conflict with its terms, was properly denied. (1 Greenleaf on Evidence, § 275; *Bush* v. *Tully*, 49 Barb. 599.)

ANDREWS, J. The issue formed by the pleadings was whether the check of Lloyd Canaday, plaintiff's assignor, dated December 14, 1876, for $2,000, drawn on the Schoharie County Bank, to the order of the defendant, was delivered to him to be used in purchasing a draft to be sent to the drawer, or whether, as the defendant claimed in his answer, it was intended as a payment in part of a claim of $5,000, which said Canaday "morally owed" the defendant, growing out of facts alleged therein. The facts so alleged were in substance, that in February, 1876, the Schoharie County Bank held a note of Lloyd Canaday, who was then insolvent, for $5,000, indorsed by his brother, George Canaday, a man of pecuniary responsibility, which the defendant, as president of the bank, at the request of Lloyd Canaday, delivered to him before it

became due, to take to his brother, upon his agreement to procure his brother's indorsement of another note of the same amount in renewal, and deliver it to the bank in place of the note so given up; that the plaintiff's assignor, with the intent to defraud the bank, made a note for the same amount, and procured it to be indorsed by another person of the same name as his brother, a man without property and insolvent, and imposed this note upon the bank in renewal of the former one, the bank supposing that the indorser was the maker's brother, and the debt was thereby lost; that defendant made good the loss to the bank, and afterward settled with Canaday the claim against him arising out of this transaction, without in fact realizing any thing therefrom but upon his promise that he would at some time pay or arrange the loss. The answer further alleges that afterward Lloyd Canaday requested the defendant to procure the bank to discount for him notes to the amount of $6,000, which he finally agreed to do upon his promise to pay out of the proceeds $2,000 upon the claim on the "bogus" note, so called, and that the defendant procured the discount, and Canaday gave him the check in question in payment of that sum, pursuant to the agreement.

Lloyd Canaday and defendant were the only witnesses on the trial. Canaday's examination in chief was confined to the proof of the agreement upon which the check was given, as alleged by him. The defendant's counsel, on the cross-examination of Canaday, sought to show by him the facts of the fraud set up in the answer, but upon the objection of the plaintiff the evidence was excluded. Upon the conclusion of Canaday's examination the plaintiff rested, and the defendant was sworn as a witness in his own behalf. He testified (in direct contradiction of Canaday) that the check was given as a payment on the claim arising out of the fraudulent note. He was fully examined in respect to the alleged agreement between him and Canaday made prior to the discount of the notes for $6,000, that he should be paid $2,000 out of the proceeds upon the claim mentioned. The defendant's counsel then offered to

prove by him the transaction "in regard to the $5,000 bogus note, for the purpose of having the jury say which of the two stories is the reasonable one," stating in detail the facts which he offered to prove in substance as they are alleged in the answer. The plaintiff's counsel objected to the proposed evidence as incompetent and inadmissible, and upon the further ground that it appeared from the opening of defendant's counsel and also from the pleadings, that the note transaction was settled by a release under seal. The record states that before the court ruled upon the offer, it was conceded that the release produced was executed at its date, and that at the time it was executed the parties "had full knowledge of the facts and circumstances connected with what has been called the bogus note transaction." The release was an instrument under seal, dated February 18, 1876, executed by the defendant and by Lloyd Canaday and others, whereby among other things the defendant in consideration (as the instrument recites) of the agreement of the other parties contained therein to indemnify the defendant against the debts and liabilities of the firm of "Lloyd Canaday" of which the defendant was a member, released Lloyd Canaday from all demands against him "by way of checks, notes or otherwise," held by the defendant or the bank. The court sustained the objection, and rejected the proposed evidence.

The correctness of the ruling presents the only question of difficulty on this appeal.

I am of opinion that the evidence offered was properly rejected. The facts relating to the fraud committed by Lloyd Canaday were not admissible in evidence, unless they were relevant to the issue, or to some fact which was itself relevant to the issue. The fraud in respect to the former note was not a fact in issue. The issue was whether the check was intrusted to the defendant as bailee of the drawer, or was transferred to him in part satisfaction of a moral obligation. If the defense had been that the check was made and delivered in payment, in whole or in part, of a legal debt owing by the

drawer to the defendant, it would doubtless have been competent for the defendant to have proved that there was a debt which the drawer was obligated to pay. The fact of the existence of a debt in the case supposed would be so related to the fact of payment as to be relevant to the issue.

So, also, in answer to a claim that money sought to be recovered was given in payment of a debt, it would be competent for the plaintiff to disprove the existence of a debt, for if there was no debt to be paid this fact would negative, by the strongest inference, the alleged payment set up by the defendant. It would be so contrary to common experience, that a person would part with his property, in payment, when there was no debt or liability to be paid or discharged, that the proof of the latter fact would afford the most satisfactory presumption that the transaction, whatever it was, was not a payment.

In this case there was direct proof by both parties of what the actual transaction was when the check was given, and the testimony of plaintiff's assignor and defendant was irreconcilably conflicting. It was a case where the court and jury were entitled to all the light which could be furnished by circumstances legitimately bearing upon the point in controversy. Would evidence, showing in detail the circumstances of the gross fraud perpetrated by the plaintiff's assignor upon the defendant nine months before, legitimately tend to confirm the defendant's version of the agreement under which the check was given? It is to be observed that Lloyd Canaday did not in his evidence deny the original fraud. The transaction was referred to by the defendant in different parts of his testimony as the "bogus note" transaction, and the existence of a moral obligation on the part of Lloyd Canaday, to indemnify him, was asserted by the defendant (as both testified), in the negotiation in respect to the discount, shortly before the check was given.

The plaintiff's assignor, on his cross-examination by the defendant's counsel, stated that he told the defendant that he did not think he ought to pay any part of the $5,000, "because in the settlement there had been a balance due me," referring to the release. But this evidence was called out by the defendant,

and furnished no reason for permitting him to go into the evidence of the details of the original transaction, if on general grounds the evidence was irrelevant. It is quite probable that if the defendant had been permitted to go into the details of the fraud, it would have had a material influence with the jury. They might have been quite ready to punish the party who committed the fraud and, in their natural indignation, would have been very likely to have lost sight of the only material inquiry, viz.: what was the agreement upon which the check was received by the defendant; was it given to and taken by him as bailee, or in discharge, or part satisfaction of a moral duty to indemnify the defendant? Upon this question I do not think evidence of the details of the fraud could have furnished any light. There is no natural inference that a man who has committed a fraud will endeavor to repair it, in the absence of any legal obligation to do so. Some men might do it, and others would not. At all events then there can I think be no legitimate presumption of the existence of the particular fact of payment from the antecedent fact that there was a strong moral obligation on the part of the other party to make reparation for his gross wrong, by payment of the resulting loss. Take the case before supposed of an admitted debt. Would it be competent upon the issue, whether certain money was received in payment of the debt, for the party maintaining that issue to show, as bearing upon the contested fact, that the debt was especially sacred, and one which the other party was bound to pay by the strongest considerations of honor and duty, as well as by the obligation of law? I think not, and for the reason that no safe inference could be drawn from such premises, and that the introduction of such an issue would tend to mislead and divert the attention of the jury from the real question in the case.

The following authorities bear with more or less directness upon the question here considered. (1 Greenl. Ev., § 52; *Elliott* v. *Gibbons*, 31 N. Y. 67; *Daby* v. *Ericsson*, 45 id. 786; *Baird* v. *Gillett*, 47 id. 186; *Green* v. *Disbrow*, 56 id.

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334; *Platner* v. *Platner*, 78 id. 90; *Townsend Manfg. Co.* v. *Foster*, 51 Barb. 346; *Green* v. *Rochester Iron Manfg. Co.*, 1 N. Y. Sup. Ct. [T. & C.] 5.) The claim that the same proof offered on the cross-examination of Lloyd Canaday, to discredit him, was erroneously excluded, is answered by the cases of *G. W. Turnpike Co.* v. *Lewis* (32 N. Y. 127), *Le Beau* v. *The People* (34 id. 223).

The judgment should be affirmed.

All concur, except RAPALLO and FINCH, JJ., dissenting.

Judgment affirmed.

JOHN ZIMMERMAN et al., Respondents, *v.* PROSPER ERHARD et al., Appellants.

The provision of the act of 1833 (chap. 281, Laws of 1833) in reference to transacting business under fictitious names, which prohibits a person from transacting business in the name of a partner not interested in the business, and which requires that where "& Co." is used it shall represent an actual partner, does not apply to or include the use of the real name of an actual partner, although such a partner is under a disability at the time.

Where, therefore, a firm is composed of a husband and wife, the latter being represented by the "& Co." in the firm name, in the absence of any intention to impose upon the public by obtaining undue credit, and conceding that a married woman cannot be a partner of her husband, this is not a violation of the statute.

Where separate purchases of goods are made at different times upon a credit for a specified time, the different sales do not constitute an entire and indivisible demand, but a cause of action accrues when the term of credit expires as to any one sale, and the vendor may bring separate actions for each sale.

The pendency of an action, therefore, to recover for goods so sold at one date is not a defense to an action for goods sold at a subsequent date.

The rendering of an account by the vendor containing all the items does not change the nature of the contracts, or show that the transactions were not separate and distinct.

(Argued November 11, 1880; decided December 1, 1880.)

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APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, entered upon an order made July 15, 1879, affirming a judgment of the General Term of the Marine Court of the city of New York, which affirmed a judgment in favor of plaintiffs on trial before a justice of said Marine Court without a jury.

This action was brought to recover for goods alleged to have been sold and delivered to defendants, at different dates, by the firm of Zimmerman & Co., composed of the plaintiffs, on a credit of four months.

The defenses interposed and the material facts are set forth substantially in the opinion.

Edward Van Ness for appellants. This action could not be maintained while the first action was pending, as the entire account was past due and constituted but one cause of action. (*Bendengel* v. *Cocks*, 19 Wend. 213; *Lane* v. *Cook*, 3 Day, 255; *Bunnell* v. *Pinto*, 2 Conn. 431; *Guernsey* v. *Carver*, 8 Wend. 492; *Stevens* v. *Lockwood*, 13 id. 644; *Hohf* v. *Meyer*, 42 Barb. 270; *Beekman* v. *Pettier*, 15 id. 550; *Secor* v. *Sturges*, 18 N. Y. 557.) There cannot be such a thing as a partnership between a husband and wife, and the use of her name is as much a fiction in law as if she had no actual existence. (Laws of 1833, chap. 281, § 1; *Swords* v. *Owen*, 43 How. Pr. 176; *In re Boyle*, 1 Tucker's Surr. Rep. 4; *In re Schlichter, in bankruptcy*, B. R. 337; *Manhattan Bank* v. *Thompson*, 58 N. Y. 82; *Owen* v. *Cawley*, 36 id. 600; *Gorman* v. *Conger*, 69 id. 87; *Manchester* v. *Shaler*, 47 Barb. 155; *Curtis* v. *Brooks*, 37 id. 476; Parsons on Part. 27; *Bradstreet* v. *Baer*, 41 Md. 23; *Losel* v. *Davidson*, 3 Allen, 131; *White* v. *Wager*, 25 N. Y. 328, 333; *Winans* v. *Peebles*, 32 id. 423; *Curtis* v. *Brook*, 37 Barb. 476; *Ford* v. *Davidson*, 3 Allen [Mass.], 131; *Manhattan Bank* v. *Thompson*, 58 N. Y. 82; *Scudder* v. *Gori*, 18 Abb. Pr. 223; *Kelso* v. *Tabor*, 52 Barb. 125; *Loomis* v. *Ruck*, 56 N. Y. 462, 464, 465; *Broom* v. *Taylor*, 76 id. 564; *Porter* v. *Mount*, 45 Barb. 423 [see 501]; *Tisdale* v. *Jones*, 38 id. 523; *Wright* v. *Sadler*, 20 N. Y. 323; *Montgomery* v. *Sparkle*,

31 Ind.; *In re Kinkead*, 3 Bissell's C. C. 405; *Perkins* v. *Perkins*, 7 Lans. 19.)

Thomas V. Cator for respondents. Chapter 281, Laws of 1833, is highly penal, and its provisions will not be extended. (*Wood* v. *Erie Ry. Co.*, 72 N. Y. 195, 198.) A defendant is bound, when pleading such a defense, to as strict a rule of pleading as though he were pleading the defense of usury, because both defenses rest upon the same ground, viz., that the contract sued upon is void, by reason of the violation of a penal statute. (*Manning* v. *Tyler*, 21 N. Y. 567; *Fay* v. *Grimsteed*, 10 Barb. 321; *Gould* v. *Horner*, 12 id. 601; *Banks* v. *Antwerp*, 5 Abb. Pr. 411; *Smalley* v. *Doughty*, 6 Bosw. 66; *Nat. Bk.* v. *Olcutt*, 48 Barb. 256; *Nat. Bk. of Auburn* v. *Lewis*, 10 Hun, 468; *Nat. Bk.* v. *Lewis*, 75 N. Y. 516, 519.) A wife may legally be the co-partner of her husband in business. (1 Parsons on Contracts, 147 [6th ed.]; *Meeker* v. *Wright*, 76 N. Y. 262; *Matteson* v. *N. Y. C. R. R. Co.*, 62 Barb. 373; *Powers* v. *Lester*, 23 N. Y. 529; 3 Kent's Com. 41; *Knapp* v. *Smith*, 27 N. Y. 277; *Buckley* v. *Wells*, 33 id. 518; *Abby* v. *Dayo*, 44 id. 343; *Whedon* v. *Champlain*, 59 Barb. 61; *Bogert* v. *Gulick*, 45 How. 385; *Merchant* v. *Bunnell*, 3 Keyes, 539; *Kluender* v. *Lynch*, 4 id. 361; *Gage* v. *Dauchy*, 34 N. Y. 293; *Adams* v. *Curtis*, 4 Lans. 164; 20 Alb. L. J. 346; 1 Blackstone, 442; 2 id. 182; *In re Kinkead*, 3 Bissell's C. C. 405; *Scott* v. *Conway*, 58 N. Y. 619; *Better* v. *Rathman*, 61 id. 512.) The disability of a *feme covert* is a personal disability, and the right to plead the same is a personal privilege, and no one can plead it for her. (*Hier* v. *Staples*, 51 N. Y. 136; *Frecking* v. *Rolland*, 53 id. 422; *Smith* v. *Dunning*, 61 id. 249.) The former action was no bar. (*Secor* v. *Sturges*, 16 N. Y. 548; *Staples* v. *Goodrich*, 21 Barb. 317; 2 Hilt. 340.)

MILLER, J. The defendants interpose, as a defense to the plaintiffs' demand, that the plaintiffs were not copartners, and that the plaintiff John Zimmerman did business under the name of "J. Zimmerman & Co.;" that the words "& Co."

do not represent any real party, and that the same are used in violation of chapter 281, Session Laws of 1833, which provides that "no person shall transact business in the name of a partner not interested in his firm; and when the designation 'and Company,' or '& Co.' is used, it shall represent an actual partner or partners." The defense rests upon the supposition that Mary Zimmerman, the wife of the plaintiff John Zimmerman, was intended by the words "& Co." and that no partnership can exist between husband and wife, and, therefore, the use of the words was illegal and a violation of the statute. That plaintiffs were husband and wife is only established by the testimony of John Zimmerman that the firm was composed of himself and his wife, Mary Zimmerman. Whether Mary was the wife of John Zimmerman at the time of the sale is not shown; nor is there any finding or request to find to that effect. But assuming the proof on this subject was sufficient, we think the use of the words "& Co." for the name of the wife was not a violation of the statute cited.

The provision in question is highly penal and will not be extended. It was intended to prevent the use of the name of a person not interested in a firm, and thus inducing a false credit to which it was not entitled. (*Wood* v. *Erie Ry. Co.*, 72 N. Y. 196, 198.) It does not apply to, and is not intended to include the use of a real name of an actual partner, even although such partner was under a disability at the time. The use, therefore, of the name of a *feme covert*, as one of a firm, where there was no intention to impose upon the public by obtaining undue credit, cannot be regarded as a violation of either the letter or the spirit of the statute cited. The name used in this case was a real one, and the words "& Co." were in no sense fictitious or unlawful within the meaning of the statute. Without considering the question whether a married woman can be a partner of her husband, it is quite obvious that such disability is not available to the defendant in this action, upon the ground set up in the defendant's answer that the words "& Co." did not represent a real party, and

the answer referred to constitutes no defense to the plaintiffs' demand.

The defense that another action was pending for the same cause of action is also without merit. The former case, for which a recovery had been had between the parties, was brought to recover the value of goods sold and delivered at a date prior to those for the recovery of the value of which this action is brought; and the proof showed that they were all sold upon a contract for a credit of four months. Under this state of facts each sale was separate and distinct, and a cause of action accrued when the time of credit expired and as the several amounts became due. The different sales did not constitute one entire and indivisible demand, and the plaintiffs could bring separate actions for each separate sale, or for all of them together, as they saw fit. The different demands were like several promissory notes or several distinct trespasses, and in the nature of separate and distinct transactions, for each of which a separate action might be brought. (*Secor* v. *Sturgis*, 16 N. Y. 548, and authorities there cited; *Staples* v. *Goodrich*, 21 Barb. 317.)

The rendering of an account containing all the items does not change the nature of the contract or evince that the transactions were not separate and distinct. The cases cited to sustain the rule that the account sued upon was entire and could not be split up so as to form the basis of separate causes of action, are only applicable where successive suits are brought for separate items of a current account or for separate installments becoming due under the same contract, and are not analogous to the facts presented in the case at bar.

There was no error, and the judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

DAVID M. JONES, Appellant, *v.* JAMES BENEDICT et al., Respondents.

Where money is collected by a creditor by the sale of collaterals placed in his hands to secure several distinct items of indebtedness, under such circumstances that neither he nor the debtor possesses the right to determine as to the application, the power devolves upon the court, and it will apply the money upon equitable principles.

W. H. held certain notes and a mortgage as security for an indebtedness of W. F.; the latter was dealing with and was indebted also to F., B. & Co. To secure any balance which might, at any time, be due from W. F. to that firm, W. H. transferred to them said securities, the same to be returned to him when such balance was paid; afterward W. H. drew drafts upon F., B. & Co. for the benefit of a mining corporation, in which he had no interest, but in which W. F. and the plaintiff were stockholders, W. F. being its superintendent; these drafts were accepted by said firm upon an agreement that the notes and mortgages should be held as security therefor; and, not having been paid at maturity, were taken up by the firm. To procure an extension of the time of payment W. F. executed his notes, payable to his order, which were indorsed by him, by plaintiff and by other stockholders, and were delivered to F., B. & Co. The stockholders, including plaintiff and W. F., subsequently executed an agreement by which each obligated himself to pay his proportionate share of liabilities assumed for the benefit of the corporation. F., B. & Co. recovered judgment upon the stockholders' notes, and subsequently collected, upon the mortgage, a sum sufficient nearly to pay the balance due them from W. F. In an action brought for relief against said judgment, plaintiff claiming that the sum so collected should be applied *pro rata* upon the debts for which the mortgage was held as security, *held*, that whether the application of the money devolved upon the creditor or the court, equity justified its application upon the balance due from W. F.

Blackstone Bank v. *Hill* (10 Pick. 129), *Cowperthwaite* v. *Sheffield* (1 Sandf. 416; affirmed, 3 N. Y. 243), and *Bridenbecker* v. *Lowell* (32 Barb. 9), distinguished.

(Argued November 11, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 17, 1879, affirming a judgment in favor of defendants, entered upon the report of a referee. (Mem. of decision below, 17 Hun, 128.)

Statement of case.

The nature of the action and the material facts are set forth in the opinion.

Leslie W. Russell for appellant. The power to apply the money realized from the collaterals devolved upon the court. (*Bridenbecker* v. *Lowell*, 32 Barb. 9; *Blackstone Bk.* v. *Hill*, 10 Pick. 129; *Cowperthwaite* v. *Sheffield*, 1 Sandf. 416; affirmed, 3 Comst. 243.) The indorsers, or those jointly liable with Witherell, have an equal right to claim the proper legal application of the payments. (*Bridenbecker* v. *Lowell*, *supra*; *Corey* v. *Leonard*, 56 N. Y. 494.) The money is applicable, *pro rata*, upon the two indebtednesses. (*Bridenbecker* v. *Lowell*, *ubi supra*; *Blackstone Bank* v. *Hill*, 10 Pick. 129; *Corey* v. *Leonard*, *ubi supra*; *Cowperthwaite* v. *Sheffield*, *ubi supra*; *Favene* v. *Bennett*, 11 East, 36; Civil Code of Louisiana, art. 2, 162; 3 Comst. 243.) Plaintiff is entitled to compel a ratable application of the $16,000 received from the security to the two debts proportionately. (*Lawrence* v. *Cornell*, 4 Johns. Ch. 545; *Croft* v. *Mott*, 4 N. Y. 604; *Coburn* v. *Wheelock*, 34 id. 440; *Marryats* v. *White*, 2 Starkie, 101; approved in Chitty on Contracts, 755, 756; Story's Eq. Jur. 459 [see note 3]; id. 459, notes *d* and *e*; *Wright* v. *Austin*, 56 Barb. 13.)

Matthew Hale for respondents. We are not to look at the mere form of the instrument, but to the true nature of the transaction, to determine the rights of the parties. (*M. & H. R. Co.* v. *Costigan*, 2 Sandf. Ch. 338; *Neimcewicz* v. *Gahn*, 3 Paige, 614, 643; *S. C.*, in error, 11 Wend. 312.) The amount realized by respondents on the foreclosure of the Louisiana mortgage was not applicable upon their judgment against the plaintiff and others. (*Pattison* v. *Hull*, 9 Cow. 773, 777; *Bridenbecker* v. *Lowell*, 32 Barb. 9, 24; Story's Eq. Jur., § 459 *g*; *U. S.* v. *Kirkpatrick*, 9 Wheat. 720, 737, 738; *U. S.* v. *Wardwell*, 5 Mason, 82, 87; *Postmaster-General* v. *Furber*, 4 id. 333, 336.) No question of marshaling of assets can arise here. (Story's Eq. Jur. 29, §§ 642, 643; *Ex parte Ken-*

Opinion of the Court, per EARL, J.

dall, 17 Ves. 520; *Dorr* v. *Shaw*, 4 Johns. Ch. 17, 20; *Ayers* v. *Husted*, 15 Conn. 504, 517.)

EARL, J. This action was commenced for relief against a judgment recovered by the defendants, James Benedict, Frederick Fawcett and Thomas Fawcett, against the plaintiff and others, on the ground that the same has been paid, or ought to be paid, out of funds in the hands of these defendants.

The material facts, as found by the referee, are as follows: Prior to 1867, William H. H. Witherell had, for several years, been a merchant in New Orleans, and had had dealings with the defendants named, who did business in the city of New York under the firm name of Fawcett, Benedict & Co. In 1867 he sold out his business to his nephew, W. F. Witherell, who, thereafter, carried on the business and had extensive dealings with Fawcett, Benedict & Co. From time to time he drew drafts on them in his business, sometimes in excess of the funds or property in their hands, which were cashed by them. In December, 1869, at New Orleans, he made his four promissory notes payable to his own order, each for $6,000, and delivered them to Pierre Jorda, and to secure the payment of the notes to any future holders thereof, he, at the same time, according to the law and practice of the State of Louisiana, executed to Jorda a mortgage upon certain land in that State. After that, being indebted to W. H. H. Witherell, he delivered to him the four notes and the mortgage to secure to him payment of such indebtedness, and in February, 1872, W. H. H. Witherell held the notes and mortgage as such security, and the indebtedness, the amount of which does not appear, has not been paid. At the same time in February, 1872, W. F. Witherell was also indebted to Fawcett, Benedict & Co., and during that month the notes and mortgage were by W. H. H. Witherell, with the consent of W. F. Witherell, delivered to Fawcett, Benedict & Co., to secure the payment to them of any balance which might, at any time, be owing them by W. F. Witherell, and to be returned to W. H. H. Witherell when such balance should be paid. Subsequently W. F. Witherell

continued to deal with Fawcett, Benedict & Co. and to draw drafts upon them in his business, and in October, 1872, he owed them a balance of over $15,000, for which they held the four notes and mortgage as security. Prior to that time, he, with the plaintiff and others, had become interested in a mining company organized in St. Lawrence county to carry on mining operations in Colorado, and he was the superintendent of the company and had the management and charge of its business. In the latter part of October, 1872, he applied to Fawcett, Benedict & Co. for the loan of their credit for the use and benefit of the mining company, by accepting drafts to be drawn upon them for $20,000, payable at future dates. Thereupon, at the special instance of W. H. H. Witherell, acting for W. F. Witherell and in the interest of the mining company, they agreed to accept drafts upon receiving an instrument as follows:

"NEW YORK, *29th October*, 1872.

Messrs. FAWCETT, BENEDICT & Co.:

Present. — We are each of us indebted to you in certain sums of money, the amounts being not yet fully ascertained, as sales of merchandise in your hands are not completed, and we desire you to accept our drafts for $11,000, at not less than thirty days sight; and within the next twenty days for $9,000 at sixty days sight. Said sums of $11,000 and $9,000 we agree to remit to you in time to meet your acceptances when they become due, by drafts on New York. You are to be paid the usual commission for accepting. We leave in your hands, as security for our indebtedness to you now, and for the reimbursement of such sums as we may draw for as above, two notes for $6,000 each, dated 20th December, 1869, at one year from date, and two notes for $6,000 each, dated 20th December, 1869, at two years from date, which said notes are made by W. Frank Witherell — one of the undersigned — and are secured by a mortgage on our land in East Baton Rouge, La., made 20th December, 1869. The drafts which we propose, as above, to draw on you will be made by W. H. H.

Witherell — one of the undersigned — and we hereby bind ourselves jointly and severally to pay you all such indebtedness now standing or to stand against us, or either of us, in full, with interest and proper charges.

W. FRANK WITHERELL,
W. H. H. WITHERELL."

Afterward, during November, 1872, as provided in that instrument, drafts were drawn on the firm by W. H. H. Witherell, in New Orleans, in all for $20,000, which were accepted by them, and such drafts were by him sold in New Orleans, and the proceeds thereof were by W. F. Witherell, or under his direction, applied to and for the use of the mining company. These drafts not having been paid at maturity by Witherell or the mining company, were taken up by Fawcett, Benedict & Co., and thereafter held by them.

In January, 1873, W. F. Witherell came from Colorado to St. Lawrence county, and he there met the plaintiff, who was president of the mining company, and other directors, and he reported to them that he had incurred large liabilities for the company, that he needed help from them, and proposed that two notes should be made, one for $10,000, payable sixty days after date, and another for $10,500, payable ninety days after date, and he said that the notes could be carried along until paid with proceeds of the mine of the company. Whereupon he made the two notes payable to his own order, and he and the plaintiff, and the defendants, Vary, Samburn, Brown, Haley, Wheelock and Thomas D. Witherell, all stockholders, and all but Haley and Witherell directors of the corporation, indorsed the notes. The notes were put into the hands of W. F. Witherell, and he delivered them to Fawcett, Benedict & Co., on account of the drafts held by them, not as payment thereof or security therefor, but to extend the time of their payment. Afterward an agreement in writing was executed by the plaintiff, and the defendants, Vary, Samburn, Brown, Haley, Wheelock, and thirty-three others, including W. F. Witherell, as follows: "Whereas, the undersigned are stock-

holders in the St. Lawrence Silver Mining Co. of Colorado, a corporation duly incorporated by and under the laws of the State of New York; and whereas the officers of said company, for the purpose of developing its property, have incurred personal obligations, and are called on to incur still further liability for like purpose: Now for the purpose of equalizing the matter and for the protection of said officers, for value received, we severally hereby agree to and with the officers of said company to pay and indemnify them and each of them for any sum which they may have to pay on account of the liability assumed or to be assumed by them for the purposes above expressed, in the same proportion or rate which the stock severally held or owned by us bears to the whole stock issued by said company."

The two notes thus made and delivered to Fawcett, Benedict & Co. not having been paid, in May, 1873, they commenced an action in the Supreme Court of this State against the maker and all the indorsers thereof to enforce payment thereof, and they recovered a judgment for the whole amount, principal and interest, in June thereafter. Afterward, in December, 1873, the defendants in the judgment paid thereon upwards of $10,000, leaving unpaid thereon nearly $11,000.

The four notes, each for $6,000, which were held by Fawcett, Benedict & Co. with the mortgages as security, not having been paid, in June, 1874, they foreclosed their mortgage by legal proceedings instituted in the State of Louisiana, and sold the mortgaged premises, and realized from them above expenses about $16,000, which was a few dollars less than the balance due them from W. F. Witherell on their account against him which existed, as above stated, October 28, 1872, and it was applied by them upon such balance.

Fawcett, Benedict & Co. were proceeding to enforce the payment of the balance of their judgment against the plaintiff and the other defendants in the judgment, when the plaintiff commenced this action to restrain the collection thereof. His claim is that the mortgage was held for the security of the drafts paid by Fawcett, Benedict & Co., as well as for the

balance of indebtedness due them — two debts — and hence that the money realized from the mortgage should be applied *pro rata* upon both debts; and whether this claim is well founded, is the important question now to be determined, and its determination depends upon the law as to the appropriation or imputation of payments.

The money in question was realized by Fawcett, Benedict & Co. by a sale of the pledge placed in their hands by the mortgage, just the same as if the pledge had been government bonds or other chattels. It was not realized in a suit brought directly to enforce their debts against W. F. Witherell. Having obtained the money by a sale of the pledge, the question is, how are they bound to apply it? The debt owed by W. F. Witherell for the balance of account was his individual debt, for which he was liable, as between him and all other persons, as principal. The debt growing out of the drafts was one created by him for the benefit of the mining company. As between him and that company, he was not the principal debtor. As to the two notes which were made by W. F. Witherell and indorsed by the plaintiff and others — one for $10,000 and the other for $10,500 — they were made for the benefit of that company. Upon them Witherell was no more principal debtor than the plaintiff and other indorsers. They were all sureties for the company, and the plaintiff and others, who executed the paper secondly above set out, were bound to indemnify Witherell against his liability, both upon the draft indebtedness and the notes, in proportion to the stock owned by them respectively in the company.

Such being the conditions, if W. F. Witherell had voluntarily paid this money to Fawcett, Benedict & Co., to apply generally upon his liabilities to them, without any specific directions, they would have had the right to apply it upon the balance of account due them, and such application, if it needed any justification, would have been justified upon two grounds: The balance of account was the oldest indebtedness, and it was one for which he was liable as principal, while the other was one for which he was liable only as surety. So much, as I un-

derstand it, is conceded by the learned counsel for plaintiff; that is, he does not dispute that if this money had been voluntarily paid to Fawcett, Benedict & Co. by W. F. Witherell, they could have applied it as they did; and so are the authorities. (*Field* v. *Holland*, 6 Cranch, 8, and note to same case in 1 Am. Lead. Cas. by Hare and Wallace, 286; *Pattison* v. *Hull*, 9 Cow. 747, and note; *Stone* v. *Seymour*, 15 Wend. 19.) And there is another principle which would in such case have authorized the same application. The balance of account was the least secured. For the other debt, the creditors held the indorsements of the plaintiff and others; and in such case, the best American authorities hold that the creditor has the right, in the absence of countervailing equities, to apply the payment upon the debt least secured, as that would be most beneficial to him. But the plaintiff claims that because this money was realized in a legal proceeding against Witherell, the firm had no right to apply it to one debt, but that the application must be made by the law *pro rata* to both debts; and I will briefly notice the authorities to which his counsel calls our attention to sustain his claim.

In *Blackstone Bank* v. *Hill* (10 Pick. 129), it was held that the principle of law by which a creditor, having several demands against his debtor, may elect to appropriate a payment to any one of them, if the debtor makes no election, is applicable only to voluntary payments; and that where a creditor recovered one judgment on several notes, some of which were made by the judgment debtor alone, and others were signed also by a surety, and took out an execution which was satisfied in part by a levy, he could not appropriate this payment solely to the notes not signed by the surety, but that all the notes were paid proportionally. The reason given for the rule as thus laid down was that as the debtor, in such case of involuntary payments, has not the power to make any election, the creditor should not have. And to the same effect are the cases of *Cowperthwaite* v. *Sheffield* (1 Sandf. 416; affirmed 3 N. Y. 243), and *Bridenbecker* v. *Lowell* (32 Barb. 9). According to these authorities, where several debts are put in suit, and money is

collected or realized upon the judgment in such suit, it must be applied *pro rata* upon all the debts. In such case, the money is received upon all the debts, as much upon one as upon another, and hence must be applied upon all. The debts are merged in the judgment, and the money is received to apply *in solido* upon the judgment, and it may well be that there can be no application upon a part of the judgment. But this is not such a case. As above stated, here the money was realized by the sale of a collateral security, and the question is as to its application after it came into the hands of the creditors. It may be said that W. F. Witherell had no right of election, and hence that he cannot be presumed to have conferred such right upon the creditors. If that be so, it is a case where the law must make the application according to equitable principles. If neither party exercises or possesses the power to apply the money, then the power devolves upon the court, and it will apply the money upon equitable principles. (Munger on the Application of Payments, 81, 210.)

Now what are the equities which are here to be taken into account? This mortgage was first delivered to W. H. H. Witherell to secure him for an indebtedness due him from W. F. Witherell, and such indebtedness has not yet been paid. He made the drafts for the benefit of the mining company, although not a stockholder thereof and having no interest therein. He then delivered the mortgage to Fawcett, Benedict & Co., to secure them for such drafts and the balance of account due them from W. F. Witherell. Subsequently the creditors received the two notes in effect as security for the draft indebtedness. These notes were made by parties interested in the mining company, for the purpose of promoting its interests and their own through it. As between them and W. H. H. Witherell, they, rather than he, ought equitably to pay the draft indebtedness; and the creditors, having the power to collect that indebtedness out of them, should be permitted to do so, rather than be forced to collect it, or any part of it, out of him. His equities, although he is not a party to this action, cannot be ignored; and he may be treated in some sense as a surety for

the plaintiff and the other indorsers of the two notes. It is, therefore, in this view, equitable that the money should be applied upon the balance of account, leaving the creditors to collect the draft indebtedness of those who, as between themselves and W. H. H. Witherell, ought justly to pay it.

But there is still another and more obvious ground for the application of the money which has been made. The mortgage was first delivered to the creditors to secure the balance of account, and it was simply left in their hands as security also for the drafts. Under such circumstances, the money realized by virtue of the mortgage should be first applied to pay the balance of account. The rule is thus stated in the learned note to *Pattison* v. *Hull* (*supra*): "If the debts were contracted at divers times upon the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts what should remain of the pledge, after payment of the first, the moneys arising from the pledges would, in this case, be applied in the first place to the discharge of the debt of the oldest standing." When Fawcett, Benedict & Co. agreed to accept the drafts, they did not give up the securities which they held; and all the Witherells could then pledge was the interest they then had in the securities which they left with the creditors, and that was the balance remaining after satisfying the amount for which they had previously been pledged.

It seems to us, therefore, plain, whether the money in question be regarded as a voluntary or involuntary payment by W. F. Witherell, and whether the application of it be devolved upon the creditors or upon the court, that equitable principles justify its application upon the balance of account.

The further claim is made by the plaintiff that there is an additional sum which the creditors ought to have realized by virtue of the mortgage, and which, if realized, would be applicable to reduce the judgment against him. It is sufficient to say of this, that there is no finding or proof which justifies the claim.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

WILLIAM WEAVER et al., Appellants, *v.* CHARLES ELY et al., Respondents.

The will of R. gave to plaintiffs certain legacies, payable after the debts of the testator had been discharged. Plaintiffs brought this action for an accounting by certain of the defendants, as executors and trustees under said will, and for a payment of the amount found due, out of the property in their hands; or, if this proved insufficient, out of the real estate in the hands of the other defendants, "so far as the same might be applicable." The referee found that the testator was insolvent, that the real estate in question was sold to pay debts and the complaint was dismissed. Defendants appeared by different attorneys, and an extra allowance of costs was made to each. *Held*, error; that the facts furnished no basis on which an extra allowance could be computed under the provision of the Code of Procedure in reference thereto (§ 309), as there was no "recovery," or "claim" for the payment of any fixed sum, and "the subject-matter involved" was plaintiffs' interest when ascertained, which proved to be nothing.

(Argued November 12, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 14, 1878, affirming a judgment in favor of defendants, entered upon the report of a referee; also, affirming an order of Special Term, which granted to each of the several defendants an extra allowance of costs.

This action was brought by plaintiffs, as legatees under the will of Fowler M. Ray, deceased; they asked for an accounting by defendants Ray and Ely, as executors and trustees under said will, and for payment by them, out of the assets in their hands, of the amounts found due plaintiffs, and in case the said assets should be found insufficient for that purpose, that certain real estate, described and alleged to be in the hands of the other defendants, should be charged with the deficiency. The referee found, in substance, that the testator was insolvent and his estate insufficient to pay his debts at the time of his death, that the real estate in question was sold to pay debts, and that a final account had been filed by the exec-

utors with the surrogate, and directed a dismissal of the complaint.

The further material facts appear in the opinion.

R. S. Guernsey for appellants. The defendants were united in interest and were not entitled to separate bills of cost. (Code of Procedure, § 306; 2 Daly, 182.) The referee's certificate, on which the motion for an extra allowance was founded, states only his conclusions; this was not sufficient. (*Gori* v. *Smith*, 6 Rob. 563.) There were no data to fix the amount involved and the motion should have been denied. (*Coleman* v. *Chauncey*, 7 Rob. 579; *Struthers* v. *Pearce*, 51 N. Y. 365.) Where there are separate bills of costs there should be no extra allowance. (*Matthewson* v. *Thompson*, 9 How. 231.) This was not a "difficult and extraordinary case" which would authorize an extra allowance. (*Duncan* v. *De Witt*, 7 Hun, 184.)

Wm. Bliss for respondents Ely and Ray. The allowance did not amount to five per cent on the value of the claim involved and hence there was no appeal on this point. (*Krekeler* v. *Ritter*, 62 N. Y. 372.)

Jas. K. Hill for respondent William Nelson. This court cannot review the exercise of the discretion of the court below in granting allowances. (*Sheridan* v. *Jackson*, 72 N. Y. 173.)

DANFORTH, J. The appellants fail to point out any finding of fact made by the learned referee without evidence in its support, and as it is clear that the facts found warrant his conclusions of law, the judgment upon the merits must be affirmed. Another question is, however, presented by an appeal from the order giving an extra allowance of costs, and as to that the result is different, for we are unable to find any matter stated which brings the case within the provisions of the Code relating to that subject. The defendants appeared by six different attorneys; they have had given to them separate bills of costs, and an extra allowance amounting to $2,250, one part to each

in sums varying from $300 to $390. The motion for this allowance was made upon the pleadings, the referee's report and certain affidavits. By the action the plaintiffs sought an accounting by the principal defendants, as trustees and executors, and prayed that the amount found due to them, under the will in question, be paid out of the assets and property yet in the hands of these defendants, or if that was insufficient, then from the real estate in the hands of the other defendants, "so far as the same might be applicable." A defense was interposed, and a trial had, which resulted, at the close of the plaintiffs' case, in a dismissal of the complaint; but I am unable to find any facts stated in the papers which furnish any basis on which an extra allowance could be computed. It must not exceed "five per cent upon the amount of the recovery or claim, or subject-matter involved." (Code, § 309.) There was no recovery; the claim was for an accounting, not for the payment of a fixed sum; but for such an amount as should, on this accounting, be found due to the plaintiffs under the will set forth in the complaint. It was undefined, and to be ascertained only by the result. The plaintiffs' legacies were payable only after the debts of the testator had been discharged, and it is found, by the referee, that the estate was insolvent. The plaintiffs' interest, when ascertained, would have been "the subject-matter involved," as in *Struthers* v. *Pearce* (*infra*). Nothing else can be gathered from the pleadings or the referee's report. Nor do the affidavits aid the defendants. It is stated in that of the attorney for the defendants Lang, Wheeler and Bailey, that the value of the real property belonging to them, sought "to be affected by this action, was upwards of $5,000;" but it could in no event be affected beyond the amount of the plaintiffs' claim, and that, as we have seen, was indeterminate. The other affidavits are silent as to this fact.

It is said "that the amount involved is upwards of $60,000," and that the allowance does not exceed five per cent on this sum, but, as I have above suggested, the amount involved could only be the plaintiffs' interest when ascertained, not the

nominal amount of their legacies. Nor can it be the amount of the estate.

In *Struthers* v. *Pearce* (51 N. Y. 365) the plaintiff claimed as copartner, and recovered one-fourth interest in the property in controversy; an extra allowance was estimated upon the value of the whole, but the court said: "Although in ascertaining what he was entitled to, it became necessary to determine the value of the entire lease; one-fourth of its value only was at issue, and the actual specific subject of the litigation;" it was also considered doubtful whether the case was one where the allowance could be regulated by the subject-matter involved.

To the same effect is the decision in *The O. & L. C. R. R. Co.* v. *Vermont & C. R. R. Co.* (63 N. Y. 176).

So far as the case before us is disclosed, no basis is furnished upon which an allowance, if proper, could be estimated; we, therefore, think the order granting the extra allowance should be reversed and the judgment appealed from modified, by deducting therefrom the additional allowance and as so modified should be affirmed, without costs to either party upon this appeal.

All concur.

Judgment accordingly.

SARAH M. HARRIS, Respondent, *v.* WILLIAM TUMBRIDGE, Appellant.

In an action upon a contract the General Term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial. (Code of Civil Procedure, § 723.)

Plaintiff purchased, through the agency of defendant, a stock option or privilege known as a "straddle," which secured to her the right to demand of the seller, at a price stated, a certain number of shares of a specified stock, or to require him to take said stock at the same price, within sixty days. Plaintiff was induced to make the purchase by printed circulars issued by defendant, explaining the nature of a

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"straddle," offering to purchase one of his selection upon payment of a specified sum, and guaranteeing that fluctuations in the stock during the pendency of the contract would amount to eight per cent, and in case it did not, agreeing to refund the amount paid, less commissions. Plaintiff authorized defendant, as her agent, to exercise the option. On the next day after the purchase defendant sold the stock "short," which resulted in a loss. In an action to recover damages, *held*, that defendant had no authority to make the sale; that in the absence of any directions from plaintiff it was defendant's duty to have closed the contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care; that the question of negligence and want of skill and care in the performance of his duty as agent was properly submitted to the jury, and authorized a recovery.

Defendant claimed on appeal that this was a gambling transaction, and as such prohibited by statute. No such defense was set up in the answer. *Held*, that the contract was not of necessity a wager contract; that this was for defendant to prove; and that the fact that it might have been so did not dispense with the necessity of proving that it was.

The price of the stock from day to day during the sixty days was shown. *Held*, that the question as to the amount of damages was for the jury.

Defendant offered evidence that it was common for parties purchasing "straddles" to operate in stock, holding the straddle as security; this was excluded, and the court charged that plaintiff, in order to be bound by any such custom, must have been aware of it. *Held*, no error.

A custom or usage in a business will not bind the parties to a contract unless it appears they had knowledge of its existence, or that it is so general that they must be presumed to have contracted with reference to it.

(Submitted November 12, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made May 29, 1879, affirming a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought against defendant, a stock broker, to recover damages for alleged unauthorized acts, negligence and want of skill as agent of plaintiff in a stock transaction, the particulars of which and the material facts are set forth in the opinion.

Brewster Kissam for appellant. Where a judge leaves it to a jury to infer a fact not warranted, it is error, and a new

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trial will be granted. (*Gale* v. *Wells*, 12 Barb. 84; *Harris* v. *Wilson*, 1 Wend. 511; *Story* v. *Brennan*, 15 N. Y. 524; *Milbank* v. *Dennistoun*, 21 id. 386.) A refusal at the Circuit to allow an amendment setting up an entirely new defense, is not a subject for exception available on appeal from the judgment. (*People* v. *Sandman*, 11 Hun, 166.) Where an agent has used reasonable diligence and skill he is not liable for accidents, or losses or damage happening without his default. (Story on Agency, p. 234, § 185; p. 235, § 188; p. 245, § 199; *Milbank* v. *Dennistoun*, 21 N. Y. 386; *Heinemann* v. *Heard*, 50 id. 27; 1 Wait's Actions and Defenses, 241, 243.) Plaintiff must affirm the transaction in whole or repudiate it in whole. (Story on Agency, p. 310, § 250.) Plaintiff ratified defendant's act in making the short sale of stock. (Story on Agency, p. 298, § 239; p. 304, § 243; p. 317, § 258; *Commercial Bank, etc.*, v. *Warren*, 15 N. Y. 557; *Meehan* v. *Forrester*, 52 id. 277; *Hawley* v. *Keeler*, 53 id. 114; *Sturgis* v. *N. J. S. B. Co.*, 62 id. 625.) The motion for a new trial, because the verdict is contrary to law, raises all questions that could have been considered on a motion for a nonsuit, or a motion to direct a verdict for appellant. (*Wehrum* v. *Kuhn*, 34 N. Y. Supr. 336; *Halpin* v. *Third Ave. R. R. Co.*, 40 id. 175; *Wehle* v. *Haviland*, 4 Daly, 550.)

Frederic A. Ward for respondent. Defendant, when he entered into this engagement, bound himself not only to good faith, but to at least such skill as is ordinarily possessed by brokers in the same business. (*Heinemann* v. *Heard*, 50 N. Y. 27.) The question whether he exercised such skill is a question of fact for the jury. (Story on Agency, 183, 186; 50 N. Y. 27, 35.) Defendant was bound to wait at least a reasonable time for a fluctuation in the price before selling. (*White* v. *Smith*, 54 N. Y. 522.) The proper measure of damages is the amount the plaintiff has lost by reason of defendant's breach of duty; the profit she would have made if defendant had acted honestly and properly. (*White* v. *Smith*, 54 N. Y. 525; *Baker* v. *Drake*, 66 id. 518.) The court, at General Term, had un-

questionable power to treat the complaint as amended, so as to conform to the facts proved in support of the judgment and in furtherance of justice. (*Clark* v. *Dales*, 20 Barb. 67; *Bate* v. *Graham*, 1 Kern. 237; *Pratt* v. *Hudson R. R. R. Co.*, 21 N. Y. 305; *Harrower* v. *Heath*, 19 Barb. 331.)

FINCH, J. The plaintiff in this case, a lady living in the country, ventured upon a speculation in stocks, and lost her money. She sued her broker and was awarded damages by a jury, upon whose verdict the judgment was entered from which this appeal is taken.

The plaintiff bought, through the agency of defendant, a stock option or privilege, known in the language of brokers as a "straddle." The word, if not elegant, is at least expressive. It means the double privilege of a "put" and "call;" and secures to the holder the right to demand of the seller at a certain price within a certain time a certain number of shares of specified stock, or to require him to take, at the same price within the same time, the same shares of stock. The continuance of the option is fixed by the agreement, and in this case was for sixty days. The value of a "straddle," it is proven, depends upon the fluctuations of the stock selected. The wider the range of these fluctuations, whether up or down, the greater the amount which may be realized; and of course the longer the option continues the greater the chance of such fluctuations during the period. The plaintiff swears that she was led into the purchase of the "straddle" in question by certain printed circulars of the defendant which she produced. Of course they point out an easy and rapid road to wealth for any one who is careful in his choice of a broker, but the material point in them is that they describe a "straddle," explain its dependence for success upon the fluctuations of the selected stock, and offer to any one who will purchase a sixty-day "straddle" of the defendant's selection, paying therefor $400, and $25 more for commission, a guaranty that the aggregate fluctuation in the stock, during the pendency of the contract, will amount to eight per cent; and further promise that if the stock does not move

to that extent, the cost of the contract less commissions shall be refunded. The plaintiff probably did not quite understand the proposition, but thinking it entirely safe, borrowed the necessary $425 with which to make the venture. She inclosed the draft to Tumbridge & Co. to invest in a sixty-day straddle-contract under their guaranty. She adds that she had invested twice before and lost her money. Made cautious by that ill fortune, she expressly adds, "If I do not understand this new arrangement of yours aright, and there is any danger whatever that I will lose the $400, then do not invest it at all until you can inform me, for I have borrowed the amount from bank and would not be able to meet payment as soon as due." The defendant answered acknowledging the receipt of the check and saying, "We do not see how you can lose any thing on such an arrangement as we propose," and then selecting Lake Shore or Western Union as the stock for the venture, he gave her a choice between the two. On the 13th of September the plaintiff answered by a telegram, "I leave the situation with you," and on the next day the defendants wrote her that they had purchased for her account a straddle-contract on 100 shares Lake Shore at 62⅞. On the next day after, the defendant sold the stock "short" against the "straddle," and this act of his is assailed on the part of the plaintiff as unauthorized, negligent and unskillful, and defended on the part of the broker as prudent and customary, and ratified by his principal. The result of the short sale was represented by the defendant to have been unfortunate and left the plaintiff with her money gone and owing the broker $9.

It is made very apparent by the evidence that the only right of the defendant, as the agent of the plaintiff, after the purchase for her of the "straddle" contract, was to exercise the option secured by it at such time within the sixty days as she might direct, or, if no instructions were given, and the "situation" was left to his care, then to exercise that option at such time within the sixty days as, taking into view the state of the market, appeared to be prudent and proper. In no event had he the right to involve the plaintiff in another and distinct

speculation, having no necessary connection with the "straddle" contract, except that, as the evidence seems to show, it had the effect to "neutralize" one part of that contract. The defendant puts his right to make the short sale complained of upon several grounds. The first is, that he was authorized, by the terms of the contract, holding the "straddle" as margin, to operate for the plaintiff in the purchase and sale of the selected stock. The arrangement between the parties is contained wholly in their correspondence. That does not at all justify such an inference. The defendant himself did not so understand the contract. In his letter announcing his action in the purchase of the "straddle" he says, "which contract we hold for closing, and, in the absence of any further instructions from you, we will exercise our best judgment in closing at the most favorable time." There is here no assumption of a right to operate in stocks, holding the "straddle" as margin, but a distinct recognition of his real duty. That was, in the absence of specific instructions, to close the option held for the plaintiff at what seemed the most favorable time.

The further ground was taken that the right to operate generally, against the "straddle" held as margin, was conceded by the complaint. In that respect the complaint was amended by the General Term so as to make it correspond with the actual facts of the contract as developed by the evidence. The power of the court to make such amendment is conceded in a proper case, but claimed to have been improperly exercised in this. Practically, the only limitation upon the right to amend the pleadings is that a new cause of action must not be introduced. (Code of Civ. Pro., § 723; *Reeder* v. *Sayre*, 70 N. Y. 180.) The amendment did not effect such a result. The cause of action for negligence and want of skill in the performance by the defendant of his duty as agent remained unchanged. A misstatement of the details of the contract was all that was changed, and it was stricken out from the pleading as unnecessary to the cause of action stated, and to some extent inconsistent with it. If the order granting the amendment is re-

viewable on this appeal, which admits of question, we see no reason to doubt its correctness and propriety.

With this understanding of the contract between the parties, and their relative rights and duties, we are prepared to test the objections made to the recovery.

It is urged that the question of authority to make the "short" sale should not have been submitted to the jury, and that they should have been directed, under the issues joined, not to consider it. But the question of authority was raised by the defendant himself. His sale of the stock "short" within a single day of the purchase of the "straddle" was assailed as negligent. He claimed in his defense that the act was within his authority and was ratified by the plaintiff. The question thus raised became a material issue in the case, and bore directly upon the ultimate question of defendant's diligence or negligence in the performance of his duty.

He complains that there was no evidence of such negligence, or of any want of skill or care on his part, and therefore that question should not have been submitted to the jury. But it is clear that there was such evidence. The plain object of the "straddle" was to secure the benefit of the possible fluctuations of sixty days. His own description of the character of such a privilege and of the greater safety of such a double option, and his guaranty of eight per cent of aggregate fluctuations, all indicated that as the essential merit of the "straddle." This contemplated benefit, the possibility and probability of profit from it the defendant threw away. He waited but a single day. He at once neutralized one-half of the option, and by so doing increased the chances of loss. He did this without plaintiff's authority and to her manifest disadvantage. The course of the stock market through the sixty days apparently shows that if he had reasonably waited its development and then exercised the option secured by the "straddle," he might have closed the contract when the stock had sufficiently advanced to have returned the plaintiff her original investment and a fair profit beside. Experts, however, familiar with the stock market, testified on both sides, and the question of

negligence and want of skill thus raised was peculiarly within the province of the jury, and their conclusion we cannot review.

The appellant further insists that his sale of stock "short" was ratified by the plaintiff. We have already suggested the answer. She could not ratify without knowledge, and denies that she even knew of the sale. The broker swears that he sent her by mail an announcement of the fact, but she swears she never received any such letter. The jury had the right to believe the plaintiff's statement, and we cannot disturb their conclusion.

It is next argued that this was a gambling transaction, and as such prohibited by statute. It may have been, but there is no proof that it was, and no such defense was pleaded. The contract was not of necessity a wager contract. That it might have been does not at all dispense with the necessity of proving that it was. The evidence now relied on is contained in a description of a "straddle" given by the witness Landon. He describes it first, and then adds, "in other words it is a bet that the stock will fluctuate so much." He speaks of a "straddle" generally. He does not speak of the actual transaction between these parties at all. As to that there is no proof of its character as a mere wager. We cannot supply it by suspicion or infer it from the making of a contract not necessarily within the prohibition.

An objection is taken to the rule of damages. It is insisted that as plaintiff never gave any directions to "put" or "call" the stock, she should not have recovered as if she had. But in the absence of such directions it was defendant's duty, under the circumstances of this case, as we have already said, to have closed the "straddle" contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care and skill. As he did not do so, she is entitled to recover what she has lost by his neglect, and the price of the stock from day to day during the running of the option having been shown, it was for the jury to determine

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that amount. (*Baker* v. *Drake*, 66 N. Y. 518; *White* v. *Smith*, 54 id. 525.)

The exceptions to the ruling which excluded proof that it was common for parties purchasing "straddles" to operate in stocks, holding the "straddle" as security; and to the charge of the court that the plaintiff must have been aware of the custom or usage among brokers, in order to bind her by such custom, were not well taken. No custom, or usage, such as to modify the contract, or become inwoven with its terms, was in any manner shown. The drift of the evidence is that there is no general rule or custom for operating in stocks, but each dealer acts on his own judgment. That contracts for the use of a "straddle," in a manner different from that contemplated by the agreement of these parties, were more or less common, was wholly immaterial; and a custom or usage which binds the parties to a contract does so only upon the principle either that they have knowledge of its existence or that it is so general that they must be supposed to have contracted with reference to it. Both rulings were, therefore, correct.

Some remaining objections to the admission and exclusion of evidence, we have examined, without finding in them any sufficient reason for disturbing the result of the trial.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

SARAH L. HORN, Appellant, *v.* THE TOWN OF NEW LOTS, Respondent.

Where an assessment is not only unconstitutional and void, but has been so judicially declared and the invalidity is such that it must appear upon the proof necessary to be made to sustain proceedings under it, it is not essential to the maintenance of an action to recover back moneys collected under the assessment that it should first be judicially vacated.

Peyser v. *The Mayor* (70 N. Y. 497), *In re Lima* (77 id. 170), *Wilkes* v. *The Mayor* (79 id. 621), distinguished.

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Bonds issued in pursuance of a statute for and in the name of a town, to defray the expenses of a local improvement, are not necessarily invalid because of illegality of the provisions in the act for the levying of an assessment to pay the bonds.

An action for moneys had and received is maintainable against a town to recover moneys of another wrongfully taken by it and applied to its own use.

City of R. v. *Town of R.* (80 N. Y. 302), distinguished.

Plaintiff's complaint alleged in substance that there was a sum of money belonging to her in the official custody of the county clerk of K. county, the same being the surplus arising upon the foreclosure of a mortgage upon certain lands belonging to her in the town of N. L.; that an assessment for a local improvement had been in form laid upon said lands in pursuance of certain statutes which were unconstitutional and void and the assessment invalid; that a tax was levied upon the premises to pay such assessment and a warrant issued to the collector of said town, who, by virtue thereof, levied upon and took said money from the county clerk and paid it to the county treasurer to the credit of the town; that bonds of the town had been issued to provide for payment of the expenses of said improvement, which were valid obligations of the town, and the money so paid was applied to the payment of said bonds, and that said town had wrongfully taken and received said money, without the knowledge or consent of the plaintiff, and applied it to its own use, and had failed and neglected to pay over the same. *Held*, that the complaint set forth a good cause of action against the town, and that a demurrer thereto was improperly sustained.

(Argued November 12, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered July 30, 1879, affirming a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint.

The substantial allegations of the complaint and the grounds of the demurrer are set forth in the opinion.

J. F. Mosher for appellant. The law authorizing the assessment being unconstitutional and void it was invalid and it was not necessary to bring an action to have it vacated. (*Stuart* v. *Palmer*, 74 N. Y. 183, 188; *Wells* v. *City of Buffalo*, 21 Alb. L. J. 234; *Townsend* v. *The Mayor*, 77 N. Y. 542, 546; *Bank of Commonwealth* v. *Mayor*, 43 id. 184; *Peyser* v. *The Mayor*, 70 id. 497; *Kamp* v. *Kamp*, 59 id. 212; *Newman* v.

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The Supervisors, 45 id. 676, 688.) The reference in the complaint to the acts relating to the assessment is as effectual as if they were set out at length. (Code Civ. Proc., § 530.) Notwithstanding the invalidity of the assessment the bonds issued by the supervisor under the same acts were valid obligations and the defendant was liable thereon. (*Knapp* v. *Town of Newtown*, 1 Hun, 268; *Marsh* v. *Town of Little Valley*, 64 N. Y. 112; *Moore* v. *The Mayor*, 73 id. 238, 251; *Howell* v. *City of Buffalo*, 37 N. Y. 267, 272.) The defendant's bonds having been issued to defray the expense of constructing a highway in the town were valid, although the construction of the highway was directed by the legislature, and the bonds were issued only through one of the town officers, without any provision being made for obtaining the consent of the citizens or the town authorities, either to the opening of the road or the issue of the bonds. (*People ex rel. McLean* v. *Flagg*, 46 N. Y. 401; *People* v. *Batchellor*, 53 id. 128, 138; *People* v. *Ingersoll*, 58 id. 1, 30; *People* v. *Tweed*, 63 id. 202, 207; *People* v. *Banks*, 67 id. 568, 575.) The defendant having received the benefit of the money, in the payment of its valid obligations, is liable to refund it to the plaintiff as money had and received to her use. (*Hathaway* v. *Town of Homer*, 5 Lans. 267; approved in 64 N. Y. 115, 116; *Hathaway* v. *Town of Cincinnatus*, 62 id. 434, 447; *Gould* v. *Town of Oneonta*, 3 Hun, 401; affirmed, 71 N. Y. 298; *Bank of Commonwealth* v. *The Mayor*, 43 id. 184; *Newman* v. *Supervisors*, 45 id. 676, 682.) The defendant has capacity to sue and be sued in and by its town name. (1 R. S. 337, § 1, sub. 1; id. 356, § 1; id. 357, § 2; 2 id. 473, § 95.) It was not necessary to make any demand on the town or present the claim before commencing suit. (*Newman* v. *Supervisors*, 45 N. Y. 676, 689; *Brown* v. *Town of Canton*, 4 Lans. 409, 411; 1 R. S. 358, § 2; 3 N. Y. S. at L. 302, § 1; Laws 1875, chap. 180; Laws of 1877, chap. 99.)

Frank Crooke for respondent. The assessment never having been vacated this action could not be maintained.

(*Wilkes* v. *Mayor, etc.*, 21 Alb. L. J. 32; *Peyser* v. *Mayor, etc.*, 70 N. Y. 497; *In re Lima*, 77 id. 170; *Rochester* v. *Rush*, 10 N. Y. Weekly Dig. 115.)

FOLGER, Ch. J. This case comes here on appeal from a judgment sustaining a demurrer to the complaint. The ground of demurrer is that the facts stated in the complaint do not show a cause of action against the defendant. The action may be called one for money had and received by the defendant to the use of the plaintiff. The averments of the complaint being taken as true, it appears that there was a sum of money belonging to the plaintiff in the official custody of the county clerk of Kings county. The money was the surplus arising upon the foreclosure of a mortgage upon certain lands in the town of New Lots, devised to the plaintiff, which mortgage was laid upon them by the devisor of the plaintiff; it was foreclosed after his death. An assessment had been in form laid upon these lands, to raise money to pay the expenses of a local improvement, by which they were benefited, or supposed to be. This assessment was laid in pursuance of acts of the legislature. (Laws of 1869, chap. 217, § 4, vol. 1, p. 407; Laws of 1870, chap. 619, § 3, vol. 2, p. 1436.) Those acts were unconstitutional and void, and the assessment was of no validity or effect. (*Stuart* v. *Palmer*, 74 N. Y. 183.) The board of supervisors of Kings county, supposing the legislative acts to be valid in that regard, levied a tax upon the premises to pay the assessment, and issued their warrant to the collector of the town of New Lots for the collection of it. He levied upon and took the money from the custody of the clerk and paid it to the county treasurer of Kings county, to the credit of the town of New Lots on account of the assessments. In the progress of the local improvement and by mandate and authority of acts above cited, bonds of the town of New Lots had been issued to provide for the payment of the expense of the improvement, in anticipation of the collection of the assessments therefor. It is alleged that they were valid obligations of the town. The money paid to the county treasurer

was applied to the payment of these bonds. It is not averred how or by whom the money was thus applied. It is also averred that the town of New Lots had wrongfully taken and received, without the knowlege or consent of the plaintiff, that money, the property of the plaintiff, and applied it to its own use, and had wholly failed and neglected to pay over the same to the plaintiff.

We think that it cannot be successfully denied that the plaintiff had a right to recover against some one for the money. It was her's as being the result of a conversion by judicial proceedings into personal property of real estate devised to her. It was taken from her, she neither willing nor consenting thereto, without lawful right. Though taken under the formality of law, the legislative acts were void and the assessment invalid. But we are not now concerned to determine against whom of those other than the defendant, who touched her money, she might properly have brought the action. The question here is, can she maintain it against the town of New Lots? The question was disposed of in the learned court below against her, on the ground that the allegation in her complaint, that the law authorizing the assessment was unconstitutional and void, is not tantamount to an averment that it was void on its face; that she was legally bound to pay the assessment until it was vacated; and that her only remedy is a reversal of the adjudication by which the assessment was laid. But we have held in *Stuart* v. *Palmer* (*supra*), not only that this assessment was unconstitutional and void, but that its invalidity must at once appear whenever it is brought into a judicial focus; and that, for that reason, a suit in equity to vacate it as a cloud upon title cannot be maintained. There are judgments that to recover back money paid or taken on an illegal assessment, there must first be a vacating of the assessment by judicial power. (*Peyser* v. *The Mayor*, 70 N. Y. 497; see, also, *In re Lima*, 77 id. 170; *Wilkes* v. *The Mayor*, 79 id. 6.21.) But they apply only in cases of assessments where the invalidity is so to speak latent, and does not appear upon the proof that must be made to

sustain proceedings under them. (*Marsh* v. *City of Brooklyn*, 59 N. Y. 280.)

The defendant urges various reasons why the action may not be maintained against it; that the town was only the enforced agent of the State in issuing the bonds and laying the assessment to provide for the payment of them, and had no discretion or interest or voluntary act in the matter; that if the assessment was invalid the town bonds were also so, as they were inseparable parts of one scheme. But these reasons are not good. So towns were enforced agents in raising men for the Union army in the late rebellion, and in issuing their obligations for bounties, yet they were held liable, and the bonds declared to be town charges. (*Marsh* v. *Little Valley*, 64 N. Y. 112.) The bonds issued for or in the name of the town may be good though the assessment be invalid; the legislature had power to direct the improvement, and to put the burden of providing the means therefor upon the town (*People ex rel.* v. *Flagg*, 46 N. Y. 401); and a contract made under lawful power is not avoided by the illegality of provisions in the same act for the levying of an assessment. (*Moore* v. *The Mayor*, 73 N. Y. 238.)

The defendant also urges that the money never came into the hands of the town. There is an averment in the complaint, as we have above stated, that the defendant had wrongfully taken and received the money, and applied the same to its own use. Now this averment, if it were against a natural person, or against an artificial entity, capable of taking money and applying it to its own use, would be sufficient, with the other facts alleged, to show a cause of action. Nor must it be construed in any other way, because of the character and capacity of the defendant against whom it is asserted. We know, to be sure, that a town, by the law of the State, is not a full corporate body; that it has no treasury or treasurer; that nearly all acts done for it and in its name are by certain officers whose offices are created by statute, such as supervisor, clerk, commissioners of highways, overseers of the poor and the like, who receive the moneys raised for the public purposes of the

town, and disburse them for the public good or to meet public duties. But an averment that the town of New Lots took and received this money, and applied it to its own use, is of more effect than to say that some officer of that town, supervisor, commissioner or the like, took, received and applied it. A receipt by any of those authorities of the town, and an application by them to the purposes of the town might not raise a liability against the town as a political division of the State. They, it is said, do not stand for the town. Their functions are prescribed by statute. They receive and pay out money as officers, in the performance of their own official duty. The town may not be liable for the receipt, nor for the failure to pay, nor for the ill-judged or unlawful payment. Therefore, this action against the town itself, by an averment in the complaint that the money was paid to the public authorities thereof, might appear to be without cause. So we held in *The City of Rochester* v. *The Town of Rush* (80 N. Y. 302). There the statement of fact was that the money was paid to the authorities of the town in payment of the expenses of the town. It is not stated that it ever went from the hands of the officers to the use of the town. The averment of fact now before us is that the town had and received the money, and applied it to its own use; and that averment is aided by the other, that the money was applied in payment of those bonds of the town. Taken together, the allegation is that the town received the money, and with it made payment of its bonds, or some of them. The bonds, as we have seen (64 N. Y., *supra*), were town charges, for which the town was liable. By their payment, a town charge and liability was discharged. We have before this affirmed judgments recovered against a town for money of another had and received by the town, and applied to its use. (*Hathaway* v. *Cincinnatus*, 62 N. Y. 434–447, cited and approved of in 64 id., *supra*; *Gould* v. *Oneonta*, 71 id. 298; *Supervisors of Dutchess* v. *Sisson*, 24 Wend. 387; *The People ex rel.* v. *Hawkins*, 46 N. Y. 9.)

It is not to be denied that the legislation of the last two

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decades of years, wise or otherwise, has affected, I may say has changed, the character and capacity of the simple township of former days. The legislature has imposed liabilities and obligations and corresponding duties upon it, that have made it something different from a mere political division of the State, and brought it in character and capacity nearer to a municipal corporation. The legislature has commanded a town in the State to issue bonds. They are to be the bonds of the town; when issued they are the bonds of the town; not of any officer of the town, not of the persons dwelling at the time in the town, not of the property situated there. So far, then, the township has been, by legislative power, made an entity, with capacity as a town to incur a debt and make an obligation, and become liable to pay. With this capacity must of need go the power to pay, the power to get money to pay, the power and capacity to receive money for its use in making payment. And therewith must go all incidents that follow that power and capacity. If by chance it gets the money of any one without the right to it, for the purpose of meeting its obligations, and applies that money to its own use in meeting them, it follows that it incurs a liability to that person therefor, as well as would a natural person, or any municipal corporation, doing the same thing. To this end are the cases just above cited.

The judgments sustaining the demurrer should be reversed, the demurrer overruled, with leave to the defendant to answer over on payment of costs.

All concur, except EARL, J., not voting.

Judgment accordingly.

PHEBE M. CLARKE et al., Respondents, *v.* MARIA E. GIBBONS et al., Appellants.

By the amendment of section 88 of the Code of Procedure in 1870 (§ 5, chap. 741, Laws of 1870), striking out married women from the list of persons against whom the statute of limitations does not run, a married woman, as to the time of commencing actions, was placed upon the same footing

as other persons, and thereafter she was bound to commence her action within the time specified after the cause of action accrued, although it had accrued prior to the amendment.

Accordingly, *held*, in an action of ejectment brought by a married woman, that an adverse possession of twenty years was a good defense.

(Argued November 15, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made May 13, 1879, affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury.

The nature of the action and the facts appear sufficiently in the opinion.

B. F. Tracy for appellants. If this action is to be regarded as one brought by Mrs. Clarke alone to recover her separate estate, it is barred by the statute. (Laws of 1860, chap. 90, § 7; Laws of 1862, chap. 192, § 3.) She was bound to bring her action within ten years after her disability ceased. (*Wilson* v. *Betts*, 4 Denio, 201; *Jackson* v. *Johnson*, 5 Cow. 74.)

Henry L. Clarke for respondents. Mrs. Clarke's right to bring this action was not affected by the amendment of section 88 of the Code of Procedure striking out married women from the list of persons against whom the statute of limitations does not run. (*Murray* v. *Gibson*, 1 How. 421; *People* v. *Lord*, 12 Hun, 282; Potter's Dwarris on Statutes, 163, and notes; *Dash* v. *Van Cleek*, 7 Johns. 477; 1 Kent's Com. 445; Assistant V. Chan. Court, 1845; *Williamson* v. *Field*, 2 Sandf. Ch. 533, followed and approved in Supreme Special Term; *Calkins* v. *Calkins*, 3 Barb. 305; *Appelby* v. *Brown*, 24 N. Y. 143 [Smith, 10]; 23 How. Pr. 207.)

EARL, J. This is an action of ejectment to recover a piece of land in the city of Brooklyn. It is alleged in the complaint that Mrs. Clarke is seized in fee of the land, subject to her husband's life estate as tenant by the curtesy. The answer denies the ownership of the land by the plaintiffs, and sets up

the defense of adverse possession. Upon the trial the plaintiffs showed that Mrs. Clarke derived her title to the land by descent from her father; but it was not shown when the descent was cast, whether before 1848 or after, and there was no proof showing that Mr. Clarke was a tenant by the curtesy or that he had any estate whatever in the land. The trial judge found that the plaintiffs were married previous to 1850, and that in June of that year, and prior thereto, Mrs. Clarke was seized of the land in fee simple, and that in that month the defendants entered into possession of the land, and have since been in the adverse possession thereof.

There was no exception by the defendants to the finding of the judge, that in June, 1850, and prior thereto, Mrs. Clarke was in the possession of the land, as owner in fee simple, and the point was not made upon the trial, in any way, that she could not recover because of her husband's life estate, as alleged in the complaint. The sole defense, apparently, relied upon by the defendants was that of adverse possession. The courts below decided that Mr. Clarke was a needless party plaintiff, and that the title to the land was in Mrs. Clarke, and that adverse possession did not run against her, because she was a married woman.

Under the Code, as it stood in 1850, adverse possession could not run against Mrs. Clarke, and she could have brought her action at any time within ten years after her disability was terminated (§ 88). But in 1870, by section 5 of chapter 741 of the Laws of that year, section 88, as well as section 101, was amended by striking out the words "or a married woman," thus entirely removing the disability of marriage, and thereafter a married woman, as to the time of commencing actions, was placed upon the precise footing of other persons. It matters not that this cause of action had then accrued, as by section 15 of the same chapter it was provided that all the sections of that act, save section 6, "shall apply to actions now pending, as well as to such as may be hereafter brought, and shall take effect immediately." After section 88 was thus amended, she was bound to commence her action within twenty years from

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the time it accrued; and we so held in *Acker* v. *Acker*,* decided in May, 1880.

It follows that the judgment should be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

JAMES N. GOTENDORF, Respondent, *v.* DANIEL GOLDSCHMIDT, Appellant.

Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant. (§ 116, sub. 2.)

Upon the petition of the plaintiff in a partition suit an order was made, as prescribed by said provision, appointing D. as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited, no steps having been taken by or on behalf of the infants, D. was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered. *Held*, that this was sufficient, both under said provision of the Code and under the provisions of the Revised Statutes in reference to proceedings in partition (2 R. S. 317, § 3), which are made applicable to actions for partition under the Code (§ 448); and, it appearing that the court had jurisdiction of the subject-matter, that a sale in pursuance of a judgment in the action gave a valid title as against said infant defendants.

(Argued November 15, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 24, 1879, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

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* 81 N. Y. 142.

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The nature of the action and the facts appear sufficiently in the opinion.

James W. Monk for appellant. The court did not acquire jurisdiction of the infant defendants, as they were not served with the summons either personally or by publication. (Code, §§ 99, 127, 134, 135, 139; *Varian* v. *Stevens*, 2 Duer, 635, 636; *Disbrow* v. *Folger*, 5 Abb. 53; *Croghan* v. *Livingston*, 17 N. Y. 218, 220, 222; *Rogers* v. *McLean*, 10 Abb. 306, 309; *Glover* v. *Haws*, 19 Abb. 161, note; *Bosworth* v. *Vandewalker*, 53 N. Y. 597.) The appointment of the guardian *ad litem* was void. (Code, § 116, subd. 2; *Varian* v. *Stevens*, 2 Duer, 635, 636; *Jennings* v. *Jennings*, 2 Abb. 6, 15; *Disbrow* v. *Folger*, 5 id. 53, 54; *Rogers* v. *McLean*, 10 id. 306, 310; *S. C.*, 11 id. 440, 456; *S. C.*, 34 N. Y. 536, 541; *Glover* v. *Haws*, 19 Abb. 161, note; new Code, § 473.) The proceedings for partition under the Revised Statutes were superseded by the Code in 1849, and the provisions of the Revised Statutes were preserved only to the extent and for the purpose of supplying any defects or omissions which might be found to exist in the Code. (*Jennings* v. *Jennings*, 2 Abb. 6, 15; *Croghan* v. *Livingston*, 17 N. Y. 218, 224, 225; *Rogers* v. *McLean*, 11 Abb. 440, 452; *Matter of Cavanagh*, 14 id. 258, 261; *Hewlett* v. *Wood*, 62 N. Y. 75, 76; *Sandford* v. *White*, 56 id. 359, 361; *Varian* v. *Stevens*, 2 Duer, 635, 636.)

Daniel T. Walden for respondent. The Constitution does not positively require personal notice in order to constitute legal proceedings "due process of law." It belongs to the legislature to determine in the particular instance, whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against, of the legal steps which are taken against him. (*Matter of the Empire Bank*, 18 N. Y. 215–216; *Schwinger* v. *Hickok*, 53 id. 284–285.) The substance of the proceeding to partition lands is unchanged

by the Code, and the various steps provided by the Revised Statutes are to be taken in the same manner and the like proceeding had as if the form had not been changed, adapting the same as to the new form. (*Sandford* v. *White*, 56 N. Y. 359; *Hewlett* v. *Wood*, 62 id. 75; *Lyle* v. *Smith*, 13 How. 105; *Varian* v. *Stevens*, 2 Duer, 635; *Althause* v. *Radde*, 3 Bosw. 410; *Disbrow* v. *Folger*, 5 Abb. 53; *Rogers* v. *McLean*, 34 N. Y. 542.) It was sufficient to serve the summons upon the guardian *ad litem*, and not upon the infant. (R. S., p. 318, §§ 10, 14; Code, § 448; *Sandford* v. *White*, 56 N. Y. 359, 361.) The guardian *ad litem* having appeared and answered for the infant defendants, this was equivalent to an appearance by them in the action as absolutely as if they had been of full age and appeared by an attorney. (2 R. S. 317, § 3; Code, § 139; *Rogers* v. *McLean*, 34 N. Y. 542; *Varian* v. *Stevens*, 2 Duer, 635, 639; *Althause* v. *Radde*, 3 Bosw. 430, 435; 3 Sandf. 385.) The court had jurisdiction to pass upon the question of the sufficiency of the proof of title, and having adjudicated upon it, the judgment is not only valid, but cannot be questioned collaterally. (*Blakely* v. *Calder*, 15 N. Y. 619; *Skinnion* v. *Kelly*, 18 id. 355; *Schaettler* v. *Gardiner*, 47 id. 404, 406.)

DANFORTH, J. The object of this action was to compel the defendant to perform his agreement to purchase and pay for certain premises situate in the city of New York. The defendant by answer objected that the plaintiff's title was good as to only three undivided fifths thereof, that the remaining two-fifths were vested in certain children of Adele Gotendorf, deceased. Upon the trial it was conceded, among other things, that the said Adele died intestate June 28, 1865, seized of the premises in question, leaving her surviving, James N. Gotendorf, her husband, and certain children named or referred to in the answer. That in June, 1871, one of said children, Sylvanus by name, commenced an action in the Court of Common Pleas for the city and county of New York, against his father and brothers and sisters (children of said Adele), for a partition

and sale of said premises. At this time some of them were over fourteen years of age and others younger, but all were minors, and resided with their father at Hamburg, Germany. The judgment in the partition suit established the above facts, and by the admissions in this action it sufficiently appears that jurisdiction over the subject-matter was acquired by the court. Under its direction the premises were sold, and the plaintiff became the purchaser. It appears, however, that the summons in the partition suit was not served upon the infant defendants, either personally or by publication, and upon this omission the defendant here rests his objection.

The general law enacts that actions shall be commenced by the service of a summons (Code, § 127), and, if against a minor, under the age of fourteen years, requires that it shall be delivered to him personally, and also to his father, mother, or guardian, or, if there be none within the State, to any person having the care and control of him, or with whom he may reside, or in whose service he shall be (§ 134, sub. 2). In certain cases, where the person on whom the service of the summons is to be made cannot be found within the State, it may be made by publication (id., § 135), and a voluntary appearance by a defendant is equivalent to a personal service of the summons upon him (§ 139). In the case before us upon petition of the plaintiff in the partition suit, an order was made by the court that Mr. Dimmock be appointed guardian for the infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of the order, procure a guardian to be appointed, and directing that a copy of the order should be served upon the infants and upon their father. This was done, and no proceeding in the meantime having been taken by them, or in their behalf, for the appointment of a guardian, Mr. Dimmock, at the expiration of the time limited, was appointed guardian *ad litem* for the infant defendants, and filed a bond and qualified as such guardian. The summons in the partition suit was served upon him, and the infant defendants appeared in the suit by their guardian and answered the complaint. The ap-

pellant contends that this appointment was void, and in proof thereof cites subdivision 2, section 116 of the Code. Provision is there made for the appointment of a guardian *ad litem* for a non-resident infant, but it is urged that even in such a case the summons should have been first served. To that effect is the Special Term decision in *Glover* v. *Haws* (19 Abb. Pr. 161, note), cited by the appellant. That, however, was a foreclosure case, where the rule enforced is not necessarily applicable to proceedings for partition, and the correctness of the decision need not be considered. As to the proceedings for partition, the provisions of the Revised Statutes (vol. 2, p. 317, tit. 3, chap. 5) are in force, so far as they can be applied to the substance and subject-matter of the action, without regard to form (Code, § 1448; *Sandford* v. *White*, 56 N. Y. 359), and I can discern, in section 116 of the Code, no intention to depart from the rules laid down in that act. It was provided by section 2 of the Revised Statutes, before referred to, that "if it shall be represented to the court, by any party intending to make such application for partition, that there are any minors who should be parties to the proceeding, and it should be proved to the court that at least ten days' notice has been served on such minors as reside within the State, or upon their general guardians, of an intention to apply for the order herein mentioned, such court shall thereupon appoint a suitable and disinterested person to be guardian for one or more of such minors, whether such minors shall reside in or out of the State, for the special purpose of taking charge of the interests of such minors in relation to the proceedings for a partition."

It will be observed that no previous notice is required to be given in the case of non-resident infants, and this I think is the true construction of the clause in subdivision 2 of section 116 of the Code, so far as it relates to non-resident infants affected by actions for partition. In such a case it provides "that when an infant defendant resides out of this State, the plaintiff may apply to the court, and will be entitled to an order designating a guardian *ad litem* for the infant defendant, unless such infant, or some one in his behalf, within a number of days speci-

fied in the order, "shall procure to be appointed a guardian for the infant, and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant." All this would be unnecessary if a previous service of the summons was required, and by the notice thus given the infant's rights are protected. When service of the summons upon the infant is required, as by the first clause of subdivision 2, section 116, its only effect is to limit the time within which he may apply for the appointment of a guardian. This result is reached as to non-resident minors, defendants, by the subsequent provisions of the same section above adverted to, under which the partition proceedings in the case before us were conducted. The order was made upon proper application, and a copy duly and personally served upon the infants, and upon their father. The latter appeared in the action by attorney, and the infants, not applying for the appointment of a guardian, the court appointed Mr. Dimmock to be their guardian upon the filing of a bond. This was done, and by him as their guardian, they appeared and answered. *This was sufficient, both under the Code* (§ 116), *and the Revised Statutes, above referred to.* By the latter (2 R. S. 317, § 3), it is provided that the guardians so appointed "shall represent their respective minors in the proceedings for partition hereby authorized, and his acts in relation thereto shall be binding on such minors, and shall be as valid as if done by such minors after having arrived at full age;" and by the Code (§ 116), after adding to the clause above cited provisions for the case of an infant residing in the State beyond mail communication, it is declared that "on such guardian *ad litem* process, pleadings and notices in the action may be served in the like manner as upon a party residing in this State." This provision may well be applied to a guardian for any minor non-resident defendant, appointed under that section, but if it does not, his duty would be as prescribed by the Revised Statutes, and would embrace this case.

The evidence upon the trial before the referee in the partition suit was sufficient to warrant the judgment, and there is no

suggestion that the rights of the infants have not been fully protected.

No defense in this action was made out, and the judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

GUSTAV CALLMEYER et al., Appellants, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The department of docks of the city of New York advertised for proposals for furnishing certain iron materials; the notice specified the period of the contract (six months), and stated that the materials must be delivered as called for by the requisitions of the treasurer, and that any bidder "must be engaged in and well prepared for the business." The contract was entered into with plaintiff; in it the quantities of material were stated as "more or less," and it was agreed that the deliveries should be "in such quantities * * * as shall be directed by the treasurer," also that the materials should be furnished "according to the specifications and the requirements of the treasurer under them;" and payments were to be made upon the engineer's certificate that "the quantities have been delivered as per requisition and in accordance with specifications." In the specifications each statement of quantity was followed by the words "more or less." *Held*, that the agreement was not for any definite or fixed quantity of material; but that plaintiff was to deliver and the city only bound to accept what was needed by the department and called for by its official requisitions; and that, therefore, an action to recover damages because of failure to take the quantities stated in the specifications was not maintainable.

***Belknap* v. *Sealey* (14 N. Y. 144), distinguished.**

(Argued November 15, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made November 6, 1879, which overruled plaintiffs' exceptions and directed judgment on an order dismissing plaintiffs' complaint on the pleadings, and the openings of counsel on trial,

save as to an item of $309.66 and interest, for which judgment was rendered.

This action was brought to recover damages for an alleged breach of a contract on the part of defendants.

The department of docks published a notice to contractors containing the following:

"CONTRACTORS' COPY.

Department of Docks, 346 and 348 Broadway.

To Contractors:

"Proposals for furnishing screw-bolts and other iron material.

"Sealed proposals for furnishing this material, indorsed as above, will be received at the office of the department of docks until 12 o'clock noon of January 20, 1874, at which time the bids will be publicly opened and read. The award of the contract will be made as soon as practicable after the opening of the bids.

"The period of this contract is for six months from the date hereof, and the material must be delivered as called for by the requisitions of the treasurer.

"Any bidder for this contract must be known to be engaged in and well prepared for the business, and must have satisfactory testimonials to that effect, and also shall give security for the faithful performance of his contract in the manner prescribed and required by ordinance."

"Bidders will state the price in the following proposals for each separate item of the material to be furnished by which the bids will be tested."

The accompanying proposals stated quantities of the items of materials, but to each statement was added the words "more or less." The contract was let to plaintiffs. In the specifications contained in it the words "more or less" followed each statement of quantity. The contract contained these clauses:

"And it is further mutually agreed by and between the parties to this contract, that the quantities to be paid for shall be measured or weighed by the engineer and his assistants in accordance with the specifications.

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"And it is further agreed that the delivery of the material shall be commenced at such time, carried on in such quantities and delivered at such points as shall be directed by the treasurer."

"And it is further agreed by said parties to this agreement, that payment shall be made on the certificate of the engineer that the quantities have been delivered as per requisition and in accordance with specifications.

"And that the said parties of the second part further agree that they shall not be entitled to demand or receive payment for any portion of the aforesaid materials, except in the manner set forth in this agreement, nor until each and every of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect."

The parties of the second part agreed to receive the prices specified "in full compensation for furnishing all the said materials according to the specifications and the requirements of the treasurer under them."

The complaint alleged that plaintiffs were prepared to supply all of the quantities stated in the specifications, furnished all that was called for by the department, and were ready to supply the residue. For the materials furnished, plaintiffs conceded that they had received payment at the contract price, save a small balance of $309.66. The breach complained of was the failure of the department to take the quantities of material specified in the contract. Upon the opening, defendant's counsel asked for a dismissal of the complaint save as to the balance unpaid for materials furnished, for which, with interest, it was conceded plaintiffs were entitled to judgment. This motion was granted, to which plaintiffs' counsel duly excepted.

Thorndike Saunders for appellant. There was a breach of the contract by defendant in failing to make direction for quantities, etc., to enable plaintiffs to deliver all specified in the contract before August 4, 1874. (*Robinson* v. *Mayor, etc.*, 3 W. D. 101.) The phrase "more or less," as used, implies only a

slight difference in quantities. (*Belknap* v. *Seeley*, 14 N. Y. 144 – 151.) The language of the agreement and the action of the parties prove their intention, and should control. (*Harrington* v. *The Mayor*, 10 Hun, 248, affirmed 70 N. Y. 604.)

A. J. Requier for respondent. Plaintiffs had no legal ground of complaint because the *quasi* estimate had not been literally followed, and consequently no cause of action. (*Harrington* v. *Mayor, etc.*, 10 Hun, 251.)

FINCH, J. This controversy was correctly decided by the courts below. There is no mistaking the true nature of the contract between the plaintiffs and the city of New York. It was not an agreement for the delivery of a definite and fixed quantity of material, which the city was bound to receive within the stipulated time, but merely a contract, entirely flexible as to quantity, to deliver such and so much as the city through its appointed agent during the six months should require. That in the specifications the probable amount thought likely to be needed was stated, guarded with the qualification of "more or less," does not change the construction. If the precise purpose might have been more fully and unequivocally expressed, yet the character and scope of the contract, its very terms and conditions, indicate plainly its meaning. The published proposals issued to contractors by the department of docks, which were entitled "Proposals for furnishing screw-bolts and other iron material," contained a distinct provision that the "period of the contract was for six months, and the material must be delivered as called for by the requisitions of the treasurer." The proposals further contained the provision that "any bidder for this contract must be known to be engaged in and well prepared for the business, and must have satisfactory testimonials to that effect." The object was to deal only with somebody capable, by his situation and surroundings, of delivering the class of material needed, in uncertain quantities and at varying times, and to deprive of any force or justice exactly such a claim as is made in this complaint; that

the plaintiff prepared himself specially for this contract-work by buying iron necessary for its completion and retaining for that purpose men, machinery and power, so that grave injury resulted because the whole estimated quantity was not taken. Then in the contract itself the quantities are stated as "more or less," and it is "agreed that the delivery of the material shall be commenced at such time, carried on in such quantities and delivered at such points as shall be directed by the treasurer." It is further stipulated that the material shall be furnished "according to the specifications and the requirements of the treasurer under them," and that "payment shall be made on the certificate of the engineer that the quantities have been delivered as per requisition and in accordance with specifications." Taking into view all these provisions, and the manifest aim and scope of the contract, it is clear that the plaintiff was to deliver and the city accept only what was needed by the department of docks, and called for by its official requisitions. Thus understood, the case is like *Harrington* v. *The Mayor, etc.* (10 Hun, 251, affirmed 70 N. Y. 604), and is decided by it. There are some differences between the contract in that case and the one under discussion, to which our attention is called. In the former the language of the specifications was, "quantities estimated as follows." The absence of the word "estimated" from the contract before us is not at all a material difference. The use of that distinct word could hardly have made the interpretation more certain. We are referred to the construction put upon the phrase "more or less," in relation to quantities of land described in a deed. (*Belknap* v. *Sealey*, 14 N. Y. 144.) In those cases the phrase was restrained and limited, it is true, but only to correspond with the manifest intention of the parties. That intention here is also to be the guide to our interpretation, and leads plainly to the result that the phrase was used to indicate an estimate merely, and that the plaintiff contracted to furnish and the city was to receive such quantity of the prescribed material as the department of docks should need and by official requisition demand during the specified continuance of the

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contract. For the quantity thus delivered the plaintiff has been fully paid, except as to a small sum which he was allowed to recover in the court below.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MILTON WOOLEY, Respondent, *v.* THE GRAND STREET AND NEWTOWN RAILROAD COMPANY, Appellant.

Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable; that defendant had put salt on its track which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. In an action to recover damages, *held*, that the evidence justified the submission of the question of defendant's negligence to a jury.

Plaintiff knew that there was a switch in that locality, but it did not appear that he had in mind its precise location; he was not thinking particularly of the switch at the moment of the accident; but, thinking the place was one dangerous to cross without care, was going slowly and using great caution. *Held*, that he was not, as matter of law, chargeable with contributory negligence; but that the question was one for the jury.

The evidence was to the effect that, as between the defendant and the other street railway, with whose tracks the switch made a connection, the defendant was to keep the switch and the abutting pavement in good condition. The court was asked to charge that if the switch was properly put down defendant was not chargeable; the request was refused, but the court charged that if the switch was skillfully put down and was in itself no obstruction, which a person could not, with ordinary care and prudence, avoid, the proposition would be correct. *Held*, no error; that although the switch was a proper one and well laid down, if it subsequently, from any cause, was raised to an undue height above the pavement, or the pavement had sunk unduly below it, it was defendant's duty to put it in good condition.

Lowery v. *B. C. & N. R. R. Co.* (76 N. Y. 28), distinguished.

Also, *held*, that although the degree of care and prudence required of one traveling upon a street wherein a street railway has been rightfully laid

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down, was greater than that required in traveling upon a street not so used, yet that it might still be characterized as ordinary.

A witness was asked, by plaintiff's counsel, whether the switch was as high at the time of the trial as at the time of the accident; this was objected to and objection overruled. *Held*, no error.

Also, *held*, that it was not error to receive evidence that there had been other accidents at the same switch.

After the court had charged, in substance, that the switch used was not in itself objectionable, but was only so if found by the jury to have been, at the time, too high to be compatible with defendant's right to a reasonable use of the street and to have been an obstruction, was asked by defendant's counsel to instruct the jury, that defendant was not chargeable with negligence in putting down the switch he did, that the switch used was not an obstruction in law, if properly laid. The court replied it would leave that to the jury. *Held*, that the request and answer must be considered in view of what the court had already charged, and so considered was not error.

(Argued November 15, 1880; decided December 1, 1880.)

APPEAL from judgment of the General Term of the city court of Brooklyn, entered upon an order made September 20, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the facts are sufficiently set forth in the opinion.

N. C. Moak for appellant. The defendant is not answerable in damages to the plaintiff for maintaining the switch in question; it was the reasonable exercise of a legal right. (*Mazetti* v. *N. Y. & Harlem R. R.*, 3 E. D. Smith, 98; *Lowery* v. *Brooklyn City & Newtown R. R.*, 76 N. Y. 28; *Lockwood* v. *North Missouri R. R.*, 34 Mo. 259.) It was error to admit the testimony as to the elevation of the switch being greater at the time of the trial than it was when the plaintiff was injured. (*Dale* v. *Delaware & W. R. R.*, 73 N. Y. 468; *Payne* v. *Troy & Boston R. R.*, 9 Hun, 526; *Salters* v. *Delaware & H. R. R.*, 3 id. 338; *Dougan* v. *Champlain T. Co.*, 51 N. Y. 1.) The testimony of the witness, Robert Squires, as to the statement he made after the accident to the defendant's superintendent about the switch, was

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improperly admitted. (*Furst* v. *Second Ave. R. R.*, 72 N. Y. 542; *Luby* v. *H. R. R. Co.*, 17 id. 131; *Whitaker* v. *Eighth Ave. R. R.*, 51 id. 295.) It was error to refuse to charge "that the defendant had a right to use the switch in question," and if it was properly put down it is not chargeable with negligence. (*Lowery* v. *Brooklyn City & Newtown R. R.*, 76 N. Y. 28; *Mazzetti* v. *N. Y. & Harlem R. R. Co.*, 3 E. D. Smith, 98; *City of Brooklyn* v. *Brooklyn City R. R.*, 47 N. Y. 482; *Lockwood* v. *North Missouri R. R.*, 34 Mo. 259.)

J. J. Perry for respondent. If defendant maintained the switch elevated above the level it is liable for the consequences whenever an accident occurs, without negligence upon the part of the injured. (*Carpenter* v. *The Central Park R. R. Co.*, *etc.*, 11 Abb. N. S. 416.) It is sufficient that the negligence of the defendant's company operated in producing the accident. (*Mott* v. *Hudson R. R. Co.*, 8 Bosw. 345; *Brehm* v. *Great Western Railway Co.*, 34 Barb. 256; *Lockhart* v. *Lichtenthaur*, 46 Penn. S. L. 157.) Whether the appliances and machinery used by the company are the best known in practical use, is a question for the jury, upon the evidence of all the witnesses on that subject. (*Steinway* v. *The Erie Railway*, 43 N. Y. 126; 2 Redf. on Railways, 189; *Benir* v. *Delaware & Hudson C. Co.*, 13 Hun, 254; *Lee* v. *Northern Cent. R'y Co.*, 3d department, January, 1879; Weekly Dig., April, 1879, 110.) The fact that numerous other accidents happened at the same switch shows it to be an obstruction and dangerous, and the attempt to show that wagons were caught in that switch in another way from that of this plaintiff can have no effect. (*Lee* v. *N. Cent. R'y*; *Quinlan* v. *The City of Utica*, 18 Hun, 11, 247.) The question of negligence is one for a jury. (*Whipple* v. *The West. Phil. Passenger R. R. Co.*, 6 W. D. 80; *Gale* v. *N. Y. C. & H. R. R. R. Co.*, 76 N. Y. 594; *Ernst* v. *H. R. R. R. Co.*, 35 id. 9; *Voak* v. *Northern C. R. R. Co.*, 75 id. 320; *McMahon* v. *Second Ave. R. R. Co.*, id. 231.) A corporation is responsible for its neglect to perform the duty imposed upon it. (*Conrad* v. *Village of Ithaca*, 16 N. Y.

158; *Weed* v. *Village of Ballston Spa.*, 76 id. 329.) Defendant is liable in as much as by its charter it obligated itself to replace and maintain the highway in a suitable and reasonably safe condition for public travel. (*Todd* v. *City of Troy*, 61 N. Y. 506; *Eggleston* v. *Columbia Turnpike*, 8 Weekly Dig. 323.) The evidence as submitted was conflicting and as such was a question for the jury and was properly submitted to the jury. (*Renwick* v. *N. C. R. R. Co.*, 36 N. Y. 132; *Millard* v. *Pinard*, 44 Vt. 34; *Ditchell* v. *Spuyten Duyvil R. R. Co.*, 5 Hun, 165; *Sheehy* v. *Burger*, 62 N. Y. 418; *Bidwell* v. *Lamont*, 17 How. 357; *Keller* v. *N. Y. C. & H. R. R. R. Co.*, 75 N. Y. 24; *Hunt* v. *Lowell Gaslight Co.*, 1 Allen, 343; *Nichols* v. *Sixth Ave. R. R. Co.*, 38 N. Y. 131; *Fallon* v. *C. P. & R. R. Co.*, 64 id. 13; *Mangan* v. *Brooklyn R. R. Co.*, 38 id. 455; *Borst* v. *Lake S. & Michigan R. R. Co.*, 4 Hun, 346; *Kirkpatrick* v. *N. Y. C. & H. R. R. R. Co.*, 6 Weekly Dig. 106.) The negligence of the plaintiff, in order to preclude him from recovery, must be such that by ordinary care he could have avoided the consequences, and the jury from the facts are to say whether the plaintiff contributed to the injury. (*Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Colgrove* v. *N. H. R. R. Co.*, 2 N. Y. 492; *Sheehy* v. *Burger*, 62 id. 588; *Green* v. *Erie R. R. Co.*, 18 S. R. R. 333; *People* v. *The N. Y. C. & H. R. R. R. Co.*, 74 N. Y. 595.) The liability of the company to restore the highway intersected by its tracks is a continuing obligation and condition of its rights to occupy. (*Requa* v. *City of Rochester*, 45 N. Y. 129; *Mayor* v. *Sheffield*, 4 Wall. 189, 195, 196.) Defendant would be liable for injuries occasioned by any fault in the original construction, or the improper condition, at any time, of its own track, even though such injuries were contributed to by the bad repair of the streets. (*Carpenter* v. *Central Park R. R. Co.*, 11 Abb. N. S. 416; *Colgrove* v. *N. Y. & N. H. R. R. R. Co.*, 6 Duer, 382; *S. C.*, 20 N. Y. 492.)

FOLGER, Ch. J. This is an action brought to recover damages for injury to the person of the plaintiff and to his

property. The injury was caused by the upsetting of the vehicle of the plaintiff in which he was going with his goods; and it was upset by striking against a switch of the defendant laid down in its track in the public street in the city of Brooklyn, and rising above the level of the abutting street pavement. The issues made by the pleadings are that the injury came to the plaintiff from his negligence contributing thereto, and that the defendants were guilty of negligence in putting the switch in the public way in the manner that it was laid down, or in suffering it to get into a bad state afterward, the objectionable manner of laying down and the suffered state as alleged being that it was too high above the surface of the pavement, and made an obstruction dangerous to travel. At the trial the plaintiff recovered, and it is as well in considering the case here, to treat the points made by the defendant in their order as presented in this court, as near as may be. We may remark however, in passing, that the attention of the parties, and consequently of the trial court, was too much distracted from the real issues in the case to what seems to us the non-essential question of the comparative merits of the switches of rival patentees of those articles.

1st. We think that it was for the jury to say whether the plaintiff was guilty of negligence contributing to the injury. It is true that he knew that in that locality was the switch now pronounced an unreasonable obstruction to travel. It does not appear that he had in mind the exact spot at which it was to be met with. It is true that he was not thinking particularly of this switch at the moment of the accident. But he was thinking of the whole space about there as not a place to cross in safety without care in doing so, and was going slowly and conducting himself with greater caution in view of the difficulty of crossing there safely. The exact spot at which was this switch was hidden from his view by the snow and slush that covered it, and which had gathered there from acts of the defendant. Such is his own testimony, sustained and supplemented in some particulars by that of other witnesses.

We cannot say, as matter of law, that he was guilty of contributory negligence.

2d. The defendant had the right to put down such appliances in the street as were needful for the convenient use of its franchise to operate a horse-railway. The restriction upon the use of this right is that the use may not be negligent or unskillful, or without reasonable care therein. It is manifest that it was a question of fact, and to be passed upon by a jury under proper instructions from the court, whether the defendant in this case used a switch that was the best for the purpose in general and acknowledged use, and laid it down with proper skill and care, in a proper manner, and so kept and used it. The defendant might have adopted a kind of switch that experience had condemned, or refused to adopt one that experience had shown to be the best, or among the best; or using the latter, had at first put it down carelessly or unskillfully; or having at first put it down well, had suffered it or the pavement about it to get out of proper position relatively or otherwise, so that there was at first or at last an obstruction in the public way needlessly and unreasonably dangerous to passers over it. These were questions for a jury to try and determine. And if they had testimony which raised them or either of them, and there was no error in the submission of the case to their consideration, their verdict is conclusive.

3d. Whether there was testimony for the jury is a point raised by the motion for a nonsuit. There was testimony of the height of the switch above the pavement; that accidents had not infrequently happened to vehicles passing there; the testimony tended to show that these mischances had come from striking against this switch; there was testimony tending to show that the defendant had put salt upon its track, and thus had caused the slush and snow to run down to and cover the switch from the sight of passers by. We think that there was testimony for the jury tending to show facts, from which it could be properly argued to them that the switch was raised at first, or afterward became higher, above the pavement than was necessary or reasonable, and being thus raised was left so

hidden by slush and snow as not to be seen, in its dangerous state, by drivers of vehicles. We cannot say that there was nothing to leave to the jury upon the question of the defendant's negligence, or want of skill or unreasonable and unnecessary use of the street.

4th. Errors are alleged to have been made in the charge. The court was asked to charge: "that the defendant had a right to use the switch in question, and if it was properly put down, they are not chargeable." It is probable that this request had reference to the kind of switch, a question much agitated on the trial, and was meant to ask the court to say that the defendant had as good right to use the Wharton, No. 2, switch as the Johnson switch. Possibly it is not so however, and we will treat it as a request referring to the switch used, without regard to what patent it was of. Thus viewed, it will be seen that the request considers only the character of the switch, and the manner of the laying of it down in the first instance. The request does not consider what may have taken place since it was laid down, either by the raising of the switch or the depression of the surrounding pavement. The switch may have been of a good pattern and design, and well laid down; but if the frost or other force of nature had raised it to an undue height above the adjacent pavement, or by any cause that pavement had been sunk unduly below it in level, and it was the duty of the defendant to meet and avoid this changed condition, it might be liable. The request to charge left out this idea. It was in testimony that this switch was one to be maintained by the defendant, which had the direction and the duty whether it should be changed or altered in its relation to the surrounding pavement. It was a fair inference that, as between the defendant and the other street railway, whose tracks the defendant reached for use by means of this switch, the defendant was to keep the switch and the abutting pavement in good condition. This case differs in this respect from that of *Lowery* v. *B. C. & N. R. R. Co.* (76 N. Y. 28). There the defendant was to lay down the switch, after that the connecting railway company was to keep in repair the abutting pavement. The

decision in that case went upon that fact, that it was the duty of the connecting company, and not of the defendant there, to keep in repair the pavement about the switch. The request having left out this idea of an after change in the relative position of the switch, was not one that the defendant had a right to have granted, in the terms in which it was put to the court, and the court did not err in not charging it in terms or in substance.

But the court not only declined to charge as requested, but did charge in terms, that if it was skillfully put down, and was in itself no obstruction that a person could not, with ordinary care and prudence, avoid, that proposition would be correct. This instruction was excepted to, and we are to determine whether it was legally correct. We think that it was. The streets of a city are primarily for the use of all its residents, in the most general mode of use. The sidewalks are for the whole community to pass to and fro upon on foot. The carriage way is for them to do so in their own vehicles, of a kind in customary use and in ordinary mode. Being for the use in this way, there cannot be asked of the citizen more care and prudence in going to and fro than that ordinarily put forth by men in general. True, what is ordinary care and prudence, upon a street used for no other purpose than the passage of men on foot or in the vehicles in general use, is of course less in degree than that which should be shown upon a way upon which a street railway had by right been laid down. But yet the degree of care and prudence needed upon the latter, though greater, may still be characterized as ordinary. It is that which most men, men of discretion in their conduct of themselves and their property, careful for the protection of their life and limb and property, will show in passing in such a street. Doubtless there may be in the needs of a street railway, occasion for placing in a public street some fixture that will prove a complete obstacle to passage over it by ordinary means and modes, and which all men must, of imperative necessity, turn completely aside from. But a switch, as such a thing is known to us to be, is not that fixture. It is one, the use of

which by the railway proprietor is compatible with the general use of the street by citizens. And it is incumbent upon the owner of the special franchise to use a switch put down in a manner that is consonant with the general rightful use of the same public way. That general rightful use is such use as men of ordinary care and prudence, having knowledge of the general location of the switch, will exercise when passing over that part of the public way at which the switch is laid down. The duty of the railway proprietor, and that of the citizen, are relative to each other. The former has the right to put down in the street such fixtures as are needful for the convenient use of his right of peculiar passage. The latter is bound to expect to meet such fixtures in the use of his common right of travel over the street, and is bound to use that care in approaching and passing by or over it, on foot or in vehicle, that men of ordinary care and prudence would put forth in the same locality and circumstances. This, we think, was the rule laid down in the reply of the trial court to the request to charge that we are now noticing. The purport of the whole charge is to the same end. The jury was told correctly, so far as it affected the defendant, of the right of the defendant, of the duty upon the plaintiff to put forth a greater degree of care in view of that right, and that it was such as any prudent person would use in the same place, and that though the switch might have been placed higher than it should be, the plaintiff must have used there that degree of care and caution. The court also told the jury that there was no pretense that the defendant was negligent in simply putting down the switch; by which the jury were given to know that the defendant had a right to put such a fixture in the public street; but that the claim of the plaintiff is that the switch is too high, and amounts to an obstruction, and left it to the jury to say whether, as matter of fact, that was so.

We do not find error in the reply of the court to this request to charge.

A witness by plaintiff's counsel was asked whether the switch, at the time of the trial, was as high as it was at the time of the

accident. This is the ground of an exception. We think it was not error to admit the testimony. How it was at the time of the trial, or at any time after the accident, might be got at by actual measurement, and there might be, as there was, dispute as to how it was at the time of the mischance. So testimony that it was to appearance higher or lower at any intervening time, was not incompetent, whether of more or less weight.

Squires, a witness, was asked and testified of his declarations after the accident to the superintendent of defendant's road about the switch. The defendant objected to the question calling for the testimony. The objection was overruled and an exception taken. The declarations were received. The defendant then said to the court: "Does your Honor consider that proper testimony?" To which the court replied: "I do not think that he has proven any conversation or admissions; they propose to prove some admissions." It thus appears that the testimony was taken by the court as preliminary to evidence of admissions from officers of the defendant, which, however, were not forthcoming. The defendant then moved to strike out the declaration of the witness sworn to by him. To which the court said: "Yes." This reply of the court is to be construed no otherwise than as granting the motion to strike that testimony from the case. We find no notice taken of it after that, either in the proofs, or charge, or requests to charge; and we must look upon it that the testimony was not before the jury.

It was not error to receive testimony of the fact that there had been other accidents at the same switch. That fact was competent to be laid before the jury. It might be explained as from other cause than the switch; but as a fact, we do not see why in the first instance it was not competent. The plaintiff had a right to show that the switch caused harm to others. One step on the way to that was to show that at the place where the switch was others had been harmed.

5. The further point is made in these words: "It was error to charge the jury that 'it was for them to determine whether

the Wharton switch was made and constructed in such a way as to form an obstruction in the street, and that, if they so found, the defendants were chargeable with negligence in using the same.'" We do not find in the appeal book that this charge was made, at least not in terms. What is referred to in this point is probably this: The court was asked to charge that there was no evidence justifying the conclusion that the defendant was guilty of negligence in putting down the switch used. To which the court said: "As I understand the evidence, there is no pretense that there was any negligence in putting down the switch; in simply putting it down. What is claimed is that it is too high, and amounts to an obstruction in the street." The court also said to the jury that the defendant was not bound to put down the Johnson switch, which had been set up before the jury as the rival of the switch of the defendant that should have been preferred, and that it had already explained the rule of law of the case. The court was asked to charge that "the defendants were not chargeable with negligence in putting down the switch they did; the Wharton switch No. 2 is not an obstruction in law, properly laid." The court said: "I will leave that to the jury." We think that these remarks of the court to the jury, in answer to these requests, are not open to objection, and were a proper treatment and disposition of the requests. They took from the jury the consideration of whether there was negligence in laying down the switch, and left to them only whether the switch that was used, in the condition in which it was shown to be at the time of the accident, was too high and thus an unreasonable obstruction in the street.

6. Another point is, that the court erred in refusing to charge that the defendant was not bound to use the Johnson switch. The court did say that there was no duty enforced on the defendant to put down that switch. It charged it as matter of law. It is now claimed that charging it as matter of law did not repair the error of the refusal, because the jury were thereby authorized to find as matter of fact that it was a duty to use it. The true interpretation of the charge is, that the law, looking at all the facts as fully and forcibly as it was possible to find

them against the defendant, declared that the defendant was not in duty bound to use the Johnson switch. This took from the jury any power to find as a fact that the duty existed.

The court was asked to charge that the defendant was not bound to use the Johnson switch, and was not chargeable with negligence for using the Wharton switch. To which the court answered by a recapitulation of some of the instruction already given, and left it to the jury to say whether the Wharton switch was made and constructed in such a way as to form an obstruction in the street; and again, on being asked to instruct the jury that "the defendants were not chargeable with negligence in putting down the switch they did; the No. 2 Wharton switch is not an obstruction in law, properly laid;" the court said that it would leave that to the jury.

We must take the request and answer of the court to the first of these requests as made in view of all that had been said by the court to the jury. It had already said in effect that the defendant was not bound to use a switch of a particular patent; it had already said that the simply putting down the switch was not negligence, and that the claim was that it was too high and amounted to an obstruction in the street. As we have said, this was the same as to say that the switch in itself was not objectionable, and was objectionable only if found by the jury to have been at the time too high to be compatible with the right of the defendant to a reasonable use of the street, and, by reason of being thus too high, to have been an obstruction in the street. When, in answer to the request now under consideration, the court said it left it to the jury to determine whether the Wharton switch was made and constructed so as to form an obstruction in the street, it meant, and must have been so understood, an obstruction such as it had before spoken of, by reason of what it had before spoken of, viz.: the too great height of it above the street level.

We think that the court did fully instruct the jury that the defendant was not bound to use the Johnson switch. The clear result of the charge is, that they were not bound to use any particular kind, but could adopt that which experience

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showed to be the best adapted for use in such circumstances. Because, in reply to a request of defendant, that it would charge specifically that, as matter of law, there was no duty enforced on the defendant to put down the Johnson switch, it did reply: "I think they were not, I will charge as matter of law. I have already explained what I think to be the rule of law governing this case," we do not think that the criticism is just that the court meant to say to the jury, or that the jury must have so understood it, that while as matter of law the defendant was not bound to use that switch, yet as matter of fact they might be. The care of the court was to keep the attention of the jury from the demands of any particular patent, and to direct it to the general rule that defendant must have used the appliances that experience in such matters had shown to be the best.

Thus we have gone through with the points of the appellants, by which they state to us allegations of error in the trial court. We do not discover that the trial court made error in its conduct of the case when it was before it.

The judgment appealed from should, therefore, be affirmed.

All concur.

Judgment affirmed.

JONATHAN WOODRUFF, Respondent, *v.* THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENGLAND, Appellant.

After a witness has testified to facts showing that he has some knowledge of the cost or value of buildings, acquired as a dealer or builder, his testimony as to the value of a building is competent.

In an application for a policy of fire insurance upon a building, under the heading of "survey," and following several questions as to the materials of which the building was constructed and its condition, was the question, "For what purpose used; state fully?" The answer was, "Dwelling." *Held*, that this was not a warranty that at the time of the application the building was in use as a dwelling; that the question simply called for what the building was designed or fitted for; and that the fact that the building at that time was unoccupied did not establish a breach of warranty.

Alexander v. *G. F. Ins. Co.* (66 N. Y. 464); *Ashworth* v. *B. M. F. Ins. Co.* (112 Mass. 422), distinguished.

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Defendant's agent at the time the application was made was informed that the house was then unoccupied and vacant. *Held*, that a condition in the policy requiring notice of and a special agreement indorsed on the policy in case the building became vacant and unoccupied, was waived.

Chase v. *H. Ins. Co.* (20 N. Y. 52); *Alexander* v. *G. F. Ins. Co.* (66 N. Y. 464); *Walsh* v. *H. F. Ins. Co.* (73 N. Y. 6), distinguished.

Within a few days after the policy was issued the house was in fact occupied as a dwelling. Subsequently there was a change of tenants; it did not appear but that the new tenants went in as soon as the old went out. No loss then occurred. *Held*, that the change was not a breach of said condition.

The building was destroyed by fire April 3, 1875. It was rented and occupied up to April 1st. The tenant had permission "to keep his things" there after that time, and as a witness for defendant he testified, "my occupancy ceased when my things were burned up;" he also testified that he occupied as tenant, the barn and carriage house, which were also insured by the policy, and continued so to do after the fire. Another witness, who went to the house to see about repairs the day before the fire, testified that he saw articles of furniture in one of the rooms, and others were locked. *Held*, that the evidence justified the submission of the question as to whether the house was "vacant and unoccupied," to the jury.

As to whether a "vacancy" under the terms of such a policy must be a vacancy of the entire premises, or whether each building insured stands by itself under the condition, *quære*.

(Argued November 18, 1880; decided December 7, 1880.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 15, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought upon a policy of fire insurance.

The facts pertinent to the questions discussed are set forth sufficiently in the opinion.

Samuel Hand for appellant. The house being vacant at the time of and before the fire the policy was avoided. (*Paine* v. *Ins. Co.*, 5 T. & C. 619; *Alexander* v. *Germania Ins. Co.*, 66 N. Y. 464; *Ashworth* v. *Ins. Co.*, 112 Mass. 422.) The knowledge of defendant's agent that it was vacant did not in

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any way waive or impair the force of the warranty in the written application, as by the express term of the policy no waiver was good unless by agreement indorsed upon the policy. (*Walsh* v. *Hartford Ins. Co.*, 73 N. Y. 5; *Alexander* v. *Germania Ins. Co.*, *supra*; *Chase* v. *Hamilton Ins. Co.*, 20 N. Y. 52–56.)

A. Edward Woodruff for respondent. The condition in this policy as to occupation was waived, as to presume otherwise would be to impute to defendant a fraudulent intent in issuing to plaintiff a policy known by it to be invalid. (*Van Schoick* v. *Niagara Ins. Co.*, 68 N. Y. 434; *Broadhead* v. *Lycoming Ins. Co.*, 14 Hun, 452; *Chase* v. *People's F. Ins. Co.*, id. 456; *McCabe* v. *Farm Building Ins. Co.*, id. 604; *Cone* v. *Niagara Ins. Co.*, 60 N. Y. 619; *Hill* v. *Hibernia Ins. Co.*, 10 Hun, 26; *Richardson* v. *Westchester Ins. Co.*, 15 id. 472; *Arthur* v. *Homestead Ins. Co.*, 78 N. Y. 465.) A waiver of a condition prospectively operates directly on the terms of the contract by eliminating the condition, and such waiver may be established by parol evidence. (*Arthur* v. *Homestead Ins. Co.*, 78 N. Y. 465; *Hay* v. *Star Ins. Co.*, 77 id. 235; *Van Schoick* v. *Niagara Ins. Co.*, 68 id. 434; *Pechner* v. *Phœnix Ins. Co.*, 65 id. 195; *Cone* v. *Niagara Ins. Co.*, 60 id. 619; *Sheldon* v. *Atlantic Ins. Co.*, 26 id. 460; *Ames* v. *N. Y. Union Ins. Co.*, 14 id. 253; *Carroll* v. *Charter Oak Ins. Co.*, 1 Abb. Ct. App. 316; *Insurance Co.* v. *Slaughter*, 12 Wall. [U. S.] 222; *Gort* v. *Natl. Prot. Ins. Co.*, 25 Barb. 468; *Hough* v. *City Fire Ins. Co.*, 29 Conn. 10; *Aurora Fire Ins. Co.* v. *Kranich*, 36 Mich. 289; *Devine* v. *Home Ins. Co.*, 32 Wis. 47; *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9.) Describing a house as a "dwelling house" is not a warranty that it is occupied. (*Browning* v. *Home Ins. Co. of Columbus*, 71 N. Y. 508.) The diagrams and plans of the property were properly admitted in evidence. (*Curtis* v. *Ayrault*, 3 Hun, 487.) Defendant is estopped from setting up the condition as to occupation, for the reason that its conduct was such as to induce the plaintiff to forego a formal compliance

with it. (*McCabe* v. *Farm Building Ins. Co.*, 14 Hun, 602; *Continental Bk.* v. *Bk. of the Commonwealth*, 50 N. Y. 578, and 68 id. 434; *Bowman* v. *Agricultural Ins. Co.*, 59 id. 521.) The premises were not vacant and unoccupied. (*Reynolds* v. *Commerce F. Ins. Co.*, 47 N. Y. 597; *Rann* v. *Home Ins. Co.*, 59 id. 387; *McMaster* v. *Ins. Co. of North Am.*, 55 id. 222; *Clinton* v. *Hope Ins. Co.*. 45 id. 464; *Hoffman* v. *Ætna Ins. Co.*, 32 id. 405; *Herman* v. *Merchants' Ins. Co.*, 44 N. Y. Supr. 444; *Bryan* v. *Peabody Ins. Co.*, 8 W. Va. 605; *Westfall* v. *Hudson River Ins. Co.*, 2 Duer, 490; *Bumstead* v. *Dividend Mut. Ins. Co.*, 2 Kern. 81; *Insurance Co.* v. *Slaughter*, 12 Wall. [U. S.] 404; *Cummins* v. *Agricultural Ins. Co.*, 67 N. Y. 260, reversing 5 Hun, 554; *Shearman* v. *Niagara Ins. Co.*, 46 N. Y. 532; *O'Neil* v. *Buffalo Ins. Co.*, 3 Comst. 122; *Globe* v. *Continental Ins. Co.*, 13 Hun, 611; *Wait* v. *Agricultural Ins. Co.*, 13 id. 371; *Paine* v. *Agricultural Ins. Co.*, 5 T. & C. 619.) The whole course of conduct of the insurance company should preclude it from now asserting that the policy was void on account of the premises being vacant and unoccupied. (*Titus* v. *Glens Falls Ins. Co.*, Alb. L. J., Aug. 28th, 1880, p. 174. Decided Court of Appeals, June 15, 1880.) Where, by a policy of insurance, the answers of the insured are made warranties, if a question is not answered, there is no warranty that there was nothing to answer, and in the case of a partial answer the warranty cannot be extended beyond the answer. (*Dilleber* v. *Home L. Ins. Co.*, 69 N. Y. 256.)

DANFORTH, J. As to the plaintiff's loss from a cause within the terms of the policy, there is no dispute, and he is entitled to the indemnity for which he bargained, unless there was on his part a violation of some condition or warranty expressed in that instrument. The amount of the loss, however, was in issue upon the pleadings. The recovery was justified by the plaintiff's evidence, but it is claimed by the learned counsel for the appellant that such evidence was improperly received, and whether it was or not is the first question to be considered.

Opinion of the Court, per DANFORTH, J.

The application on which the policy issued contains no statement as to the value of the buildings, nor was the defendant misled in respect thereto. The insurance asked for was $7,000 on the dwelling and $2,000 on a barn described as 100 feet from the house. These things are recited in the policy, there brought together and stated in these words: "$9,000 — five years — $100." Payment of the premium is admitted on the face of the policy, and in consideration thereof the defendant promised to pay to the assured all such loss or damage not exceeding $9,000, "as shall happen by fire to the property as above described, during five years from the first of April, 1872, to be estimated according to the actual cash value of the property at the time the fire shall happen;" and a loss having occurred, the assured is required by subdivision 11 of the policy to give forthwith an account thereof, showing among other things "what was the whole cash value of the subject insured." The policy also contained a condition declaring it to be of no force and effect in case "the above mentioned premises * * * become vacant and unoccupied, or the hazard otherwise increased * * * without special agreement indorsed on this policy." The complaint alleges the burning of the dwelling-house April 3, 1875, the other facts above alluded to, and that by reason thereof the whole sum for which the house was insured became due to the plaintiff. The defendant admits the insurance, and averring in the language of the policy above set forth; that the loss was to be estimated according to the actual cash value of the property at the time the same shall occur, alleges "that it was not then of the cash value of $7,000, but that its cash value did not exceed $3,000." Under the policy and the issue made by the pleadings it was incumbent on the plaintiff to prove the fact stated, viz., the actual cash value of the property at the time it was destroyed. The evidence objected to was given for that purpose, and the particular question put to each witness appears to have been so framed that it would meet the limitation prescribed by the twelfth section of the policy, to wit, that the cash value of the property destroyed should in "no case exceed what would be

the cost to the assured at the time of the fire, of replacing the same." Blake therefore was asked, "have you made an estimate of what it would cost at the time of the fire to build such a house in that location?" and after answering that he had, and giving some intermediate explanation, put it at $8,055.68. Such in substance was the course pursued with other witnesses whose testimony varied as to the amount and whose means of information were more or less ample. Blake was a carpenter and builder, Bonney an architect, Harris an insurance and real estate agent, but had of late been engaged in appraising similar property, had formerly worked in the erection of buildings, being by trade a "tinner and plumber." He says: "I built a good many." Duryea had built houses and had bought and sold others. He was also a real estate appraiser, knew the house in question and its condition. Slater was a house painter, had built houses, and knew and had examined the one covered by the policy. These witnesses were all competent to express an opinion upon the question submitted to them, for they had some knowledge of the cost or market value of such property, acquired as dealers or builders. (*Bedell* v. *L. I. R. R. Co.*, 44 N. Y. 367; *Judson* v. *Easton*, 58 N. Y. 664.) The facts on which their opinions rested were stated to the jury, and they were thus prepared to give to the testimony such weight as they thought proper under the instructions of the learned trial judge. To these instructions no exception was taken, nor was he asked to charge further upon that subject. Before issuing the policy the company might have examined and estimated the insurable value of the property, and it would not have been an exercise of undue prudence had they done so. It does not appear that they did not. They did receive a premium in advance for an insurance for a term of years at a fixed sum, and should now make good their promise to such extent as the evidence requires. It is true the defendant's witnesses were of the opinion that the property was of less value, although none put it so low as the sum set out in the answer, and if their testimony had been accepted by the jury a different result would have been reached; but that cannot now aid the defendant.

It is also urged that by the terms of the proposal for insurance, the plaintiff warranted, at the time the application was made, the building was used as a dwelling, "whereas it was vacant and unoccupied." It would, I think, be a sufficient answer to this position, that such defense was not set up in the pleadings, but without insisting upon that objection, it does not seem well founded. It rests upon the language of the application. Under the heading "Survey," are several questions unanswered, and then the following: "Building; is it brick or wood? A. Wood;" there are questions as to its "condition," "When built?" "How many stories high?" "Whether it was ever on fire?" then the question "For what purpose used?" "State fully" A. "Dwelling." This is not susceptible of the interpretation given to it by the learned counsel for the appellant. The question does not call for the present as distinguished from the appropriate use of the building. It relates to a "building," and is intended to elicit information as to whether it is for traffic, as a store, or mechanical purposes, as a shop; it is, as if the questioner asked, for what is the building designed or fitted? And the answer is descriptive, not of any present occupation or actual use, but simply of the class or character of the building. We find confirmation of this view in the provision of the policy that if the "premises are at any time during the period for which it would otherwise continue in force, used for more hazardous purposes than that called for in the original contract of insurance, the policy shall be of no force."

The contract thus referred to calls for or describes as the subject of insurance "a two story frame dwelling-house," and the two phrases have an evident relation to each other. The inquiry and the answer in the application enter into the policy, and furnish a criterion by which to limit the responsibility of the insurer. The answer also shows that this was the understanding of the defendant. It set up as a defense that the plaintiff on or about the 1st of January, 1874, without the knowledge of the defendant, and against its will, used the first story of the building or dwelling-house, or a part of said build-

ing in said policy mentioned, as a depository or place for storing loose straw or hay, and continued to make or suffer such use from thence until and at the time of the fire in the complaint alleged, "and that for this additional risk they never charged or received any premium," and therefore they say the policy became void. It is nowhere stated that the defense was a breach of warranty as to the occupation of the house at the time the policy was issued. The cases (*Alexander* v. *Germania F. Ins. Co.*, 66 N. Y. 464, and *Ashworth* v. *Builders' M. F. Ins. Co.*, 112 Mass. 422), cited by the learned counsel for the appellant, do not apply. In the first, the insurance was upon a "building occupied as a dwelling," and the other turned upon the meaning of the word "unoccupied," as used in the policy. On the other hand, the case is within the decision of this court in *Browning* v. *Home Ins. Co. of Columbus* (71 N. Y. 508), and that of *Cumberland Valley Mut. Protection Co.* v. *Douglas* (58 Penn. St. 419), where it is held that calling the premises a dwelling-house is a description of the subject, not a stipulation, and is no engagement that they are occupied, but only that when occupied it shall be as a dwelling-house.

In the next place, the defendant was informed, at the time the application for insurance was made, that the house was then unoccupied and vacant, and with knowledge of this fact the premium was taken and the policy issued; the defendant, therefore, cannot be permitted to say it never assumed the risk. (*Van Schoick* v. *Niagara Fire Ins. Co.*, 68 N. Y. 434.) *Cone* v. *Same*, decided in the Supreme Court (3 T. & C. 33), and affirmed here (60 N. Y. 619), establishes upon facts substantially like those before us, that it is proper to show knowledge on the part of defendant's agent of the condition of the dwelling-house when the policy was issued, and this being established, the stipulation in it requiring notice or an indorsement thereon to that effect, should be deemed waived by him, and through him by the company. Nor is there an inconsistency between this result and (*Chase* v. *Hamilton Ins. Co.*, 20 N. Y. 52; *Alexander* v. *Germania Ins. Co.*, 66 id. 464, and *Walsh*

v. *Hartford Fire Ins. Co.*, 73 id. 5) the cases referred to by the appellant. In the first two the applicant for insurance made a misstatement, and the knowledge of the defendant's agent did not aid the plaintiff; in the last a distinction is taken between the power of an agent at the inception of a contract and after it has taken effect. Within a few days after the policy now in question issued, the house was in fact occupied as a dwelling, and continued to be so until June or July, 1874, when, as the defendant claims, for a short time, it was vacant. The fire did not occur then, nor until April, 1875, and we can find nothing in the pleadings which makes that vacancy material, nor any thing in the evidence which would permit the court to decide its existence as matter of law, and hardly enough to warrant a conjecture or suspicion to that effect on the part of the jury, much less a finding. The claim made, rests on the testimony of Elias S. Harris, given to defendant's counsel upon cross-examination. He says, as agent for the plaintiff he rented the house to Brunt and Harris, part to each, in June or July, 1874. He was asked, "When did you go to Woodruff to see the agency?" His answer, "I think it was about the time about that it was vacated by some of his folks; when they moved out I asked if he wanted to rent it, he said yes; I found two parties who wanted small apartments, and I put them in there more to take care of the house than any thing else." For any thing that appears the new tenants went in at the instant the others went out, for the only witness upon the subject says he cannot tell how long the latter were out before the others went in, and there is no guide by which to determine. But as to this the judge charged, "If parties moving out, and others moving in, and the necessary time for such change of situation occurs between the moving out and the moving in, unless such time is unreasonable, the policy would not become invalidated," and left it to the jury to say what would be a reasonable time. No exception was taken to this direction, and, in view of the fact that the occurrence was nearly a year before the fire, was as favorable to the defendant as it had a right to ask. It

does not, therefore, become necessary to inquire whether a vacancy at that time would be within the provision of the policy and, if so, to determine its effect. It is, however, alleged in the answer that, at the time of the fire, on April 3, 1875, the house was vacant and unoccupied, and it is now contended by the learned counsel for the appellant that the court should have held as matter of law that the policy was thereby avoided; but it does not appear that the learned trial judge was at any time requested to make such ruling. On the contrary, the motion for a nonsuit twice repeated was put on other grounds, viz.: at the close of the plaintiff's case on the grounds as stated by counsel:

"1st. The plaintiff has not shown affirmatively that he has fulfilled all the conditions of the policy.

"2d. The plaintiff has not made out his case affirmatively on the subject of the valuation of the property destroyed.

"3d. It has been shown by the plaintiff's own witnesses that the property was vacant and unoccupied during the term of the policy; before Harris and Brunt occupied them, and the non-occupation at any time during the existence of this policy made it void. The motion was denied by the court and the ruling excepted to by the defendant."

And at the close of the whole evidence it was renewed by defendant's counsel on the same grounds, "and" as is said "particularly upon the third ground that the evidence shows the premises were vacant and unoccupied when the policy was issued, and as a matter of law that fact made the policy void, and of no effect." Moreover, the defendant's counsel asked the court to charge: "If the jury find from the evidence that the dwelling became vacant and unoccupied before the fire, or was so vacant and unoccupied at the time of the fire, without special agreement indorsed on the policy, the policy then became of no force and effect, and no recovery can be had." The learned court complied with the request and so charged. It was thus assumed that as to this main and important fact, there was evidence for the consideration of the jury, and they having answered the ques-

tion submitted to them, it is too late now for the appellant to assert the contrary. But if it was otherwise it is clear that the question was one proper for the jury. (*Grant* v. *Howard Ins. Co. of N. Y.*, 5 Hill, 10.) With the exception of a few days at the time of issuing the policy, the brief but uncertain period in 1874, before referred to, the house was rented and occupied by tenants, and so it was up to April 1, 1875. The day before the fire occurred Slater was in the house, to consider what need it had of repairs, and on cross-examination by defendant's counsel was asked what he saw, he said "I saw some articles of furniture there, I believe," in one of the rooms on the first floor. Other rooms were locked, and those he did not enter. His testimony upon this point is of little importance, but it was given in behalf of defendant, and does not show that the house was vacant. The defendant also sought to prove this fact by two witnesses, testifying to admissions by the plaintiff. They were, however, contradicted by him. He swore that he did not make the admissions, and the jury must have believed him. The defendant also examined two witnesses, Harris and Brunt, by commission. They were the last tenants of the house. Harris says: "The occupancy ceased when my things were burned up. I don't think it ceased at all, I asked the agent if I could not get all my things out by the first of April, whether I could keep them in there, and he said I could," and to another interrogation put by the defendant he says, "my occupancy ceased when my things were burned up." The same witness says he "kept a horse and occupied, as tenant, the barn and carriage-house, and continued to do so at the time of and after the destruction of the dwelling-house by fire."

It is not necessary to decide whether the vacancy, under the terms of this policy, must be a vacancy of the entire premises, or whether each subject of insurance stands by itself under the condition, for in the latter view the case went to the jury, and this was not only the defendant's wish, but it was most favorable to it. It was matter of defense, and to be made out by it. It could not have been decided in its favor as a question of law. A vacant house is literally an empty house. This

house was not shown to be empty. There were some things actually seen in it, rooms locked, and not examined, affirmative testimony that the tenants' "things;" and these things, the jury might hold under the evidence, to have been the tenant's furniture, were there, and were burned up. Its value is not given, nor are the articles enumerated. The law affords no rule to determine the value or the quantity of property, household stuff or other chattels, which kept upon the premises limits the risk to that of a dwelling-house, or prevents such a dwelling-house from becoming within the language of insurance, one "more hazardous." The insurers might have covered this question by a stipulation, but they have not done so. One or more persons may live in a house, and in either case it is occupied. They may have much or little furniture, and in neither event is it vacant. Doubtless the contract is to be enforced according to its true spirit, but its meaning must be obvious, and require no straining in order to provoke a forfeiture.

These views cover the questions made by the defendant, and lead to the conclusion that upon the trial no exception was well taken, and that the judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

WILLIAM L. PALMER, Appellant, *v.* WILBUR PURDY as Executor, etc., Impleaded, etc.

It seems that one of several original debtors may so contract with the others for their assumption and payment of the common debt, as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor.

Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety.

Plaintiff leased certain premises to a firm. Two of the partners subsequently left the firm and the premises, the partners remaining having by valid contract assumed and agreed to pay the rent thereafter accruing. In an action brought against the original members of the firm to

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recover such rent, it appeared that plaintiff was informed that the two partners were going out, and that the others were to remain and would pay the rent; but it did not appear that he was advised of any agreement by which those remaining were bound to pay the rent, or by which the legal relation of the retiring members of the firm to the common liability was changed. *Held*, that the evidence failed to establish the right of the retiring partners to be treated as sureties.

S. & O., the defendants who continued the business gave their notes to plaintiff for rent in arrears. These were accepted by him upon the express stipulation that the liability of G & P. the other defendants, should not thereby be released, and with the reservation of his rights and remedies against them. *Held*, that the arrangement was not such an extension as discharged G. & P., even if the rights of sureties were accorded to them.

(Argued November 18, 1880; decided December 7, 1880.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made November 29, 1879, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought originally against Lyman A. Gill, Prior F. Purdy, Francis Cassidy and William Flanigan to recover a balance of rent alleged to be due and unpaid upon a lease executed by plaintiff to the firm of Gill, Purdy, Cassidy & Co., which was composed of said defendants. Gill and Purdy alone answered, alleging that soon after the execution of the lease said firm was dissolved, they retiring therefrom and renting another store, and that the business was thereafter continued by Cassidy and Flanigan, who continued in possession of the premises, having agreed to assume and pay the rent for the unexpired term, with the knowledge and assent of the plaintiff, who subsequently received the promissory notes of Cassidy and Flanigan in full payment for all arrears of rent. Gill died before trial and Purdy after the appeal to this court.

The facts appearing on trial are sufficiently set forth in the opinion.

F. E. Dana for appellant. Mere delay in prosecuting the

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principal does not exonerate the surety unless there has been a request by him to proceed. (*Clark* v. *Sickles*, 64 N. Y. 231; *Thompson* v. *Hall*, 45 Barb. 214; *Pain* v. *Packard*, 13 Johns. 173; *Bk. of Oswego* v. *Poucher*, 56 N. Y. 548; *Hubbard* v. *Gurney*, 64 id. 457; *Cary* v. *White*, 52 id. 138, 143; *Remsen* v. *Gates*, 41 id. 471; *Neimceweiz* v. *Gahn*, 11 Wend. 312; *Marshall* v. *Davies*, 78 N. Y. 414; *Bangs* v. *Strong*, 10 Paige, 11; *Smith* v. *Rogers*, 17 Johns. 340; *Wood* v. *Robinson*, 22 N. Y. 564; *Halliday* v. *Hart*, 30 id. 474; *Bates* v. *Rosekrans*, 37 id. 409; *Lowman* v. *Yates*, id. 601; *Van Elten* v. *Tranddden*, 1 Hun, 432; *Vernam* v. *Harris*, id. 451; *Millerd* v. *Thorn*, 56 N. Y. 402; *Dodd* v. *Dreyfuss*, 17 Hun, 600.) Hand, by taking the notes of Cassidy and Flanigan for part of the amount due from the defendants for rent, without any agreement in reference thereto, did not extend the time of payment of the rent. (*Hubbard* v. *Gurney*, 64 N. Y. 457; *Millerd* v. *Thorn*, 56 id. 402; *Halliday* v. *Hart*, 30 id. 474; *Cary* v. *White*, 52 id. 138; *Gahn* v. *Neimceweiz*, 11 Wend. 312.) But even if the notes had been received in payment of the rent, they discharged the debt only *pro tanto*, and left the defendants liable for the balance, $146.21. (*Lowman* v. *Yates*, 37 N. Y. 601.) A new agreement between a creditor and his principal debtor will not discharge the sureties when, by the new agreement, the remedies of the creditor against the sureties are expressly and clearly reserved. (*Morgan* v. *Smith*, 70 N. Y. 537, 545; *Boultbee* v. *Stubbs*, 18 Vesey, 20, 22; *Burke's Case*, cited *ex parte Gifford*, 6 id. 805, 809; *Webb* v. *Hewitt*, 3 Kay & J. 338; *Kearsley* v. *Cole*, 16 M. &. W. 126; *Calvo* v. *Davies*, 73 N. Y. 211, 217; *Elwood* v. *W. U. Tel. Co.*, 45 id 549; *Lomer* v. *Meeker*. 25 id. 361; *Koehler* v. *Adler*, 78 id. 287.)

Amos G. Hull for respondent. Defendant was discharged from all liability to plaintiff by the acts of the latter. (*Millerd* v. *Thorn*, 56 N. Y. 402; *Colgrove* v. *Tallman*, 67 id. 95; *Dodd* v. *Dreyfus*, 17 Hun, 600; *Calvo* v. *Davies*, 73 N. Y. 216.)

Opinion of the Court, per FINCH, J.

FINCH, J. The defense in this case would have been sound, if the facts proven had brought it within the rule of law applied upon the trial. It is settled that one of several original debtors can so contract with the others for their assumption and payment of the common debt as to acquire the rights of a surety, upon knowledge of the new arrangement being communicated to the creditor. (*Millerd* v. *Thorn*, 56 N. Y. 402; *Colgrove* v. *Tallman*, 67 id, 95; *Calvo* v. *Davies*, 73 id. 216.) This is not a rule which in any manner assumes to alter or modify the original contract or the common liability. That remains as an unchanged fact, and may be enforced as freely and perfectly as ever against all the debtors. The change effected is that as between themselves, one becomes a surety for the rest because of a valid agreement by which they become primarily liable for the debt and bound to pay it in exoneration of their associate, and this fact being fairly and fully brought to the knowledge of the creditor, he is bound to respect the rights of the debtor who had become a surety and acquired the right to protection as such. When, therefore, by the agreement of the debtors among themselves, it is sought to invest one or more of them with new equitable rights outside of the original contract by notice to the creditor of the later arrangement, it is not too much to require that such notice shall be definite and distinct, and so given as to fully and fairly apprise the creditor of the new agreement in fact made, and the changed attitude of the debtor claiming the rights of a surety.

That was not done in this case. Of the four tenants, all liable for the rent, two, Gill and Purdy, left the firm and the premises, and two, Cassidy and Flanigan, remained, having by a valid agreement with the outgoing partners assumed and agreed to pay the rent thereafter to accrue. If the fact of that agreement had been fairly communicated to the creditor the right of Gill and Purdy to be treated as sureties would have been established. But no such communication is shown. The only fact proven is that Cassidy informed the plaintiff's agent that Gill and Purdy were going out and Cassidy and Flanigan were to remain and pay the rent. No

agreement by which they were bound to do so made between themselves and Purdy and Gill, was in any manner communicated to plaintiff or his agent. The sole witness relied on is Cassidy. He testified: "I told Mr. Hand at the time that we were going to remain there, and we would pay the rent along. Ques. That is that you and Cassidy would pay the rent? Ans. Flanigan and I would stay there. Ques. And would assume and pay the rent? Ans. Yes, sir. Ques. And that Gill and Purdy were going away? Ans. They were going — yes, sir." And when, on cross-examination, he was asked to repeat exactly all that he remembered of this conversation, his answer was, "I don't know as I — I didn't — could not remember the exact conversation, what it was. The whole import of it was that Gill and Purdy were going out, and that we were going to remain." In all this there is an utter failure to prove the essential fact that the existence of an agreement between the partners by which Cassidy and Flanigan had become primarily bound to pay the rent was communicated to Hand. No such agreement is stated at all. Nothing is told inconsistent with the idea that the legal relation of Gill and Purdy to the common liability remained unchanged. That they were going out, that Cassidy and Flanigan would remain, that the latter would pay the rent, were the sole facts communicated, but there was nothing in them to indicate the existence of an agreement upon the dissolution by which the remaining partners were bound to pay the rent in exoneration of the retiring members of the firm, or to warn the creditor that such retiring partners had been placed in the position and acquired the rights of sureties.

The unsoundness of the defense, however, did not end here. Certain notes were given by Cassidy and Flanigan for rent in arrears, which it is claimed extended the time of payment so as to discharge Gill and Purdy, if indeed they had acquired the rights of sureties. While the defendants do prove that the notes were made to the order of Hand for the purpose of paying the rent, they do not prove their delivery to Hand at all. The latter, however, admits their delivery to him by Prentice,

the bookkeeper of Cassidy and Flanigan, but swears that when they were delivered he accepted them upon the express stipulation that the liability of Gill and Purdy should not thereby be released, and expressly reserving the rights and remedies of the plaintiff against them. There is no contradiction of this evidence, and the undisputed fact is that the notes were delivered and accepted upon the express condition referred to. Such arrangement did not discharge Gill and Purdy, even if we accord to them the rights of sureties. (*Morgan* v. *Smith*, 70 N. Y. 545; *Calvo* v. *Davies*, 73 id. 211.) The agreement, as was said by ANDREWS, J., in the case last cited, "does not operate as an absolute but only as a qualified and conditional suspension of the right of action:" * * "it is treated in effect as if it was made in express terms subject to the consent of the surety, and the surety is not thereby discharged."

It is apparent, therefore, that no defense to plaintiff's conceded claim for the rent was established, and no question of fact was raised to be submitted to the jury. And when, at the close of the evidence, the plaintiff's counsel asked the court to direct a verdict for the plaintiff for the amount claimed, which request was refused under exception, an error was committed, vital to the case, and for which the judgment should be reversed.

The judgment should be reversed; new trial granted, costs to abide event.

All concur except RAPALLO, J., absent.

Judgment reversed.

EDWARD S. HAND, Respondent, *v.* GEORGE H. KENNEDY et al., Appellants.

Plaintiff sold to defendant W. certain premises, taking a mortgage thereon to secure a portion of the purchase-money; subsequently W. conveyed to defendants K. and H. undivided interests in said premises, the deed reciting that the parties thereto were jointly interested in the purchase

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from plaintiff, the title having, for convenience, been taken in the name of W. for the use and benefit of all in certain specified proportions, and that the grantees had assumed and agreed to pay their proportions of said mortgage. The conveyance was made subject to the mortgage, and the proportions thereof specified the grantees assumed and agreed to pay as part of the consideration. In an action to recover a deficiency arising on foreclosure of the mortgage, *held*, that there was a sufficient consideration to sustain the covenant of the grantees; and that plaintiff, as mortgagee, could enforce the same.

The cause was noticed and moved for trial at special term. Before the counself or plaintiff opened his case, defendants' counsel "objected to the jurisdiction of the court and demanded a jury trial." The court reserved its decision, and the parties proceeded with the trial; evidence was given on both sides and the case submitted to the court. It did not appear, by the case, that either party asked the court to decide the question so reserved, or objected to finishing the trial before him. *Held*, that the action was one at law and defendants were entitled to a jury trial; but that by completing the trial without insisting upon a ruling as to their right to a jury, they waived that right.

Also, *held*, that an exception, filed after the decision of the action, to the failure of the court to decide the question, was not available.

It seems, that defendants should have insisted upon a ruling, and if the court ruled adversely to them, or if it declined to rule at all, or reserved its decision, should have excepted; or as soon as the nature of the case was developed should have insisted upon a ruling and taken an exception.

(Argued November 29, 1880; decided December 7, 1880.)

APPEAL from order of the General Term of the Superior Court of the city of New York, entered upon an order made November 3, 1879, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 13 J. & S. 385.)

This action was brought by plaintiff to recover a deficiency arising on foreclosure of a mortgage executed to him by defendant Williamson.

The complaint set forth and the answer admitted a contract between the parties by which plaintiff agreed to sell and defendants to purchase certain premises, and a contract between the defendants by which it was agreed, among other things, that, as a matter of convenience, the title of said premises should be taken by and in the name of Williamson, he to hold and dis-

pose of it for the benefit of the purchasers. The complaint then alleged a conveyance by plaintiff to Williamson, he giving his bond secured by mortgage upon the premises; also a subsequent conveyance by Williamson to the other defendants. The material portions of this conveyance, as well as the other material facts, appear in the opinion.

Hamilton Wallis for appellants. The court which tried the case had no jurisdiction over it; defendants were entitled to a trial by jury. (*Guernsey* v. *Rogers*, 47 N. Y. 238; *Ayres* v. *Dixon*, 78 id. 318; *Patterson* v. *Birdsall*, 6 Hun, 637; *Marsh* v. *Pike*, 10 Paige, 597; *Comstock* v. *Drohan*, 71 N. Y. 9; *Paine* v. *Jones*, 76 id. 274; *Marshall* v. *Davies*, 78 id. 414; *Hand* v. *Fairchild*, 3 Abb. Ct. of App. Dec. 157; *Simonson* v. *Blake*, 20 How. Pr. 487.) There was a complete accord and satisfaction of plaintiff's claim against Kennedy and Hutchinson, under the original contract. (*James* v. *Heckley*, 16 Johns. 273; *Waydell* v. *Luer*, 3 Denio, 510; *Williams* v. *Gillies*, 75 N. Y. 197; *Ayers* v. *Dixon*, 78 id. 318.) The obligation having been discharged no liability, either as principal or surety, survives. (*Vail* v. *Foster*, 4 N. Y. 312; *Williams* v. *Gillies*, 75 id. 197; *Wanzer* v. *Carey*, 76 id. 526.) The reduction of the time on the bond from five to three years was an entirely different thing from what was contemplated when the contract of suretyship was entered into and discharged the sureties. (*Paine* v. *Jones*, 76 N. Y. 274.) A mere agreement to pay the debt of another cannot be enforced, unless it is supported by a consideration. (*Totter* v. *Hughes*, 12 N. Y. 74; *Garnsey* v. *Rogers*, 47 id. 239; *Campbell* v. *Smith*, 71 id. 26.) Where the promisor makes an agreement with the promisee by which a third party is to be benefited, although no consideration may move from the third party, it is indispensable that a consideration should exist somewhere to enable him to enforce it. (*Garnsey* v. *Rogers*, 47 N. Y. 238; *Lawrence* v. *Fox*, 20 id. 268; *Campbell* v. *Smith*, 71 id. 26.) Where a party receives a conveyance of property subject to a mortgage, which he assumes, retaining the amount of the mortgage debt out of

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the purchase-money, the mortgagee can recover the amount so retained. The retention of the mortgage debt out of the purchase price, creates the liability. (*Vail* v. *Forster*, 4 N. Y. 312; *Garnsey* v. *Rogers*, 47 id. 238; *Comstock* v. *Drohan*, 71 id. 13.) An assumption in a mortgage would not make the assumer liable, not even if the mortgage was upon its face a deed. (*Garnsey* v. *Rogers*, 47 N. Y. 238.) Nor will an assumption hold good where the assumer's grantor was not liable for the mortgage. (*King* v. *Whitely*, 10 Paige, 465; *Vrooman* v. *Turner*, 69 N. Y. 280; *Cushman* v. *Henry*, 75 id. 103.) The respondent is estopped by his statements to Kennedy and Hutchinson from setting up any claim for a deficiency. (*N. Y. & N. H. R. R. Co.* v. *Schuyler*, 34 N. Y. 60; *Hathaway* v. *Paine*, 34 id. 109.)

Aaron Pennington Whitehead for respondent. Plaintiff is entitled to ask the court for an equitable subrogation to all the rights of the defendant Williamson, as against his co-defendants Kennedy and Hutchinson, in reference to the three-fourths of the mortgage assumed by them, upon the principle that the undertaking of the grantee to pay off an incumbrance is collateral security acquired by the mortgagor, which inures (by an equitable subrogation) to the benefit of the mortgagee. (*Curtis* v. *Tyler*, 9 Paige Ch. 432; *Halsey* v. *Reed*, 9 id. 446; *March* v. *Pike*, 10 id. 595; *Blyer* v. *Monholland*, 2 Sandf. Ch. 478; *King* v. *Whitely*, 10 Paige Ch. 465; *Trotter* v. *Hughes*, 2 Kern. 74; *Vail* v. *Foster*, 4 Comst. 312; *Burr* v. *Beers*, 24 N. Y. 178; *Maure* v. *Harrison*, 1 Eq. Ca. Abr. 93; *Parsons* v. *Briddock*, 2 Vern. 608; *Waring et al., ex parte*, 19 Ves. 345.) Collateral securities given by a debtor to his surety are considered as trusts for the better security of the creditor's debt, and chancery will see that this intention be fulfilled. (4 Kent's Com. 307; 1 Eq. Jurisprudence, § 502; *Maure* v. *Harrison*, 1 Eq. Ca. Abr. 93; *ex parte Perfect*, Mont. Bk. Rep. 25; *Wright* v. *Morley*, 11 Ves. 22; *ex parte Waring*, 19 id. 345; *Vail* v. *Foster*, 4 Coms. 312, 314; *Curtis* v. *Tyler*, 9 Paige Ch. 432; *Halsey* v. *Reed*, 9 Paige, 446; *Blyer* v. *Monholland*, 2 Sandf. Ch.

478; *King* v. *Whitely*, 10 Paige, 465; *Marsh* v. *Pike*, id. 595; *Trotter* v. *Hughes*, 12 N. Y. 74; *Burr* v. *Beers*, 24 id. 178; *Schermerhorn* v. *Vanderheyden*, 1 J. R. 140; *Farley* v. *Cleveland*, 4 Cow. 432; 9 id. 639; *Barker* v. *Buklin*, 2 Den. 45; *Hudson C. Co.* v. *Westchester Bk.*, 4 id. 97; *Lawrence* v. *Fox*, 20 N. Y. 268; *Thorp* v. *Keokuk Coal Co.*, 48 id. 253.) Where equity formerly had exclusive jurisdiction in any particular set of circumstances, the fact that common-law courts have since afforded relief does not oust the jurisdiction of equity, and it will now exercise concurrent jurisdiction with courts of law. (*Atkinson* v. *Leonard*, 3 Bro. C. C. 218; *Wright* v. *Hunter*, 5 Ves. 792; *Kemp* v. *Pryor*, 7 id. 249; *East India Co.* v. *Boddam*, 9 Ves. 463; *Eyre* v. *Everitt*, 2 Russ. 382; *Sailly* v. *Elmore*, 2 Paige, 497; *Mayne* v. *Griswold*, 3 Sandf. 463; *N. Y. Ins. Co.* v. *Roulet*, 24 Wend. 505.) A court of equity will ascertain and fix the respective liabilities of the defendants upon the agreements A and B and upon the deed of September 23, 1874. (*Beal* v. *Finch*, 11 N. Y. 128; *Bohn* v. *Taylor*, 6 Cow. 313.) The promise made by Kennedy and Hutchinson to Williamson was, in effect, a promise made by them upon a valid consideration, for the benefit of the plaintiff, and although the plaintiff was not privy to the consideration, yet as the promise has been adopted by him it is to be deemed made to him, and equity will lay hold of and enforce it for the benefit of the plaintiff. (*Lawrence* v. *Fox*, 20 N. Y. 268; *Burr* v. *Beers*, 24 id. 178; *Berly* v. *Taylor*, 5 Hill, 533; *Williams* v. *Fitch*, 18 N. Y. 546.) The effect of the covenant assuming payment of the incumbrances in the deed of September 23, 1874, is that as between the defendants, Williamson became the surety of Kennedy and Hutchinson as respects the debt due the plaintiff. (*Curtis* v. *Taylor*, 9 Paige Ch. 432; *Trotter* v. *Hughes*, 2 Kern. 74; *March* v. *Pike*, 10 Paige, 597; *Cornell* v. *Prescott*, 2 Barb. 16; *Blyer* v. *Monholland*, 2 Sandf. Ch. 478; *Ferris* v. *Crawford*, 2 Denio, 595; *Tripp* v. *Vincent*, 3 Barb. Ch. 613; *Rubens* v. *Prinde*, 44 Barb. 336; *Russell* v. *Pistor*, 3 Seld. 171; *Burr* v. *Beers*, 24 N. Y. 178; *Lawrence* v. *Fox*, 20 id. 268.)

Opinion of the Court, per EARL, J.

EARL, J. This action can be maintained upon the cause of action given to the plaintiff by the deed executed by Williamson to Kennedy and Hutchinson, the appellants, and the prior contracts between the parties need not be resorted to for that purpose. That deed recites that the parties thereto had become jointly interested in the purchase of certain lands from the plaintiff and from others; that for the convenience of the parties the title to the lands so purchased had been taken in the name of Williamson, to be held for the use and benefit of all the purchasers, in the proportions named; that the grantees had agreed to assume and pay their proportions of the mortgages executed by Williamson for portions of the purchase-money of the lands, and that it was deemed proper and expedient for Williamson to convey to the grantees their interests in such lands. The deed conveys so much of the lands as had not been sold by the purchasers, and the conveyance is subject to plaintiff's mortgage and other mortgages which the grantees in certain proportions assume and agree to pay as part of the consideration or purchase-money. This agreement contained in this deed can be enforced by the plaintiff as mortgagee. And the right to maintain the action rests upon the principles laid down in *Lawrence* v. *Fox* (20 N. Y. 268); *Burr* v. *Beers* (24 id. 178); *Thorp* v. *Keokuk Coal Co.* (48 id. 253); *Campbell* v. *Smith* (71 id. 26), and kindred cases. The claim that there is no consideration to uphold the agreement, is without any foundation. As between Williamson and the grantees in his deed, they were bound to assume and pay portions of the mortgages, and they could not have compelled him to convey to them the land which he held for their benefit until they either paid or assumed to pay their portions of the mortgages. Hence the conveyance to them furnishes ample consideration for their agreement.

Upon the trial the defendants gave some evidence tending to show that the plaintiff had informed the defendants that he would purchase the property at the foreclosure sale for the amount due upon the mortgage, and that they need not attend

the sale, and that they, in consequence thereof, did not attend the sale; and hence they claim that the mortgage ought to be treated as paid. But this evidence on the part of the defendants was disputed by the plaintiff, and the court at Special Term found the facts upon this issue in favor of the plaintiff. That finding concludes us, and there is therefore no basis for this claim made by the defendants. There are no facts upon which they can found an argument that the mortgage must, as to them, be treated as paid, or upon which they can claim that the plaintiff is, as to them, estopped from claiming payment from them of the amount awarded to him.

A further point is made, that the defendants were entitled to a jury trial. We are of opinion that the plaintiff's remedy upon the covenant sued on was an action at law. The relief demanded and granted was a purely money judgment. There were no equities to adjust, and no equitable relief was needed. But the point that the defendants were entitled to a jury trial was not taken in such manner that we can consider it. The case was noticed and moved for trial at a Special Term before a judge without a jury. Before the counsel for the plaintiff opened his case, the counsel for the defendants "objected to the jurisdiction of the court, and demanded a jury trial." The court did not pass upon the question thus raised, but reserved its decision. Both parties then proceeded with the trial, both gave evidence, and the case was submitted to the trial judge. It does not appear that either party asked the judge to decide the question reserved, or objected to finishing the trial before him. By trying the case before him and finally submitting it to him for decision without insisting upon a jury, both parties must be held to have waived a jury trial. The defendants should have insisted upon a ruling by the judge upon their right to a jury trial, and if he ruled adversely to them, they should then have taken an exception. If he declined to rule at all or decided to reserve his decision, they should have excepted to this; or as soon as the nature of the case was developed by the opening or the evidence, they should have insisted upon a ruling and taken their exception. (*Sharpe* v.

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Freeman, 45 N. Y. 802.) When the judge decided to reserve his decision, the parties could not have understood that he would first try the case and then determine whether he had the right to try it. It must have been understood that he would reserve the decision until he could see from the opening or some evidence, whether the action involved matters of equity or of purely legal cognizance, and then decide the question reserved. The judge, by proceeding with the trial to its termination, must have determined that the defendants were not entitled to a jury trial, and no exception was taken to this determination. It would not be just to allow the defendants, under such circumstances, to go through the trial and take their chances of succeeding, and then, after an adverse decision, raise the question that they ought to have had a jury trial. Hence the exception filed by the defendants after the decision of the case, that the judge "did not determine as a conclusion of law that he had no jurisdiction to hear or determine" the action, is not available to them. If it was intended to present the question that they should have had a jury trial, for reasons stated it came too late.

The judgment should be affirmed.

All concur.

Judgment affirmed.

HERMAN VEEDER, Respondent, *v.* BENJAMIN M. BAKER, Appellant.

As an action under the manufacturing act (§ 15, chapter 40, Laws of 1848), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (Code of Civil Procedure, § 983) and must be tried in the county where the cause of action or some part thereof arose.

As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another.

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The right of the defendant in such an action to have the place of trial changed to the proper county, where the venue is laid in another, is an absolute one, and his motion to secure that right cannot be defeated by proof showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial as stated in the complaint.

It *seems* that the proper practice in such case is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change is authorized by the Code (§ 987) he must make his motion.

In such an action where the venue had been laid in the wrong county, defendant served with his answer a demand that the venue be changed to the proper county, and this not having been complied with, moved to change both on the ground that the wrong county was stated, and for the convenience of witnesses. Plaintiff demurred to one of the defenses set up in the answer. The demurrer and the motion were argued together, the former was overruled on the ground that the complaint did not state a cause of action, and the motion was denied. Plaintiff served an amended complaint; defendant answered, serving with his answer a new demand to change the place of trial to the proper county, this not having been complied with he moved to make the change, the motion was denied on the ground that a similar motion had been made and denied, and no leave to renew granted. *Held*, untenable; that as when the motion was first made the complaint stated no cause of action the motion could and it may have been denied on that ground, and when a sufficient complaint was served defendant was entitled to make a new demand and another motion without leave of the court.

(Argued November 30, 1880; decided December 7, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made September 24, 1880, affirming an order of Special Term which denied a motion to change the place of trial in this action from the county of St. Lawrence to the county of Monroe.

The nature of the action and the facts are set forth sufficiently in the opinion.

J. C. Cochrane for appellant. This is an action for a penalty. (*Merchants' Bk.* v. *Bliss*, 35 N. Y. 412.) The party is to be tried in the county where the act was done by which the liability was incurred. (*Leland* v. *Hathorn*, 42 N. Y. 547.) A debt is never local, it is transitory and follows the residence of

the debtor. (Graham's Pr. [2d ed.] 195.) The debt gives the creditor a standing in court as a party, but the offense is the cause of action or liability imposed by the statute. (*Wiles* v. *Suydams*, 64 N. Y. 177.) There being a new complaint, a new answer, a new cause of action and a new issue, the defendant, as a matter of right, could make a new motion. (*Erie R. R.* v. *Rumsey*, 57 Barb. 440; *Belmont* v. *Erie Railway Co.*, 52 id. 637.)

Edward C. James for respondent. Where any element of discretion enters into the decision of the court below the order is not appealable. (76 N. Y. 629.) The place of trial of local actions is subject to the power of the Supreme Court, to change it where the convenience of witnesses and the ends of justice will be promoted by the change. (Code, § 987; id., § 985.) The facts required the court to exercise its discretion whether, under the circumstances, it would make the change. (7 How. Pr. 385.) That discretion will not be reviewed. (76 N. Y. 629; 53 id. 322.) The debt was an important part of the cause of action. (27 N. Y. 297, 300; 68 id. 34, 38–39; 62 id. 202, 205; 63 id. 62, 73; 50 id. 137.) The former order was conclusive upon the parties unless appealed from and reversed. (25 N. Y. 203; 74 id. 378–379; 14 Abb. Pr. 56, 61.) The court, in its discretion, properly denied the former motion, although the greater number of witnesses resided in Monroe, because it was satisfied that the proposed change would work injustice and oppressive delay. (Code, § 987; *King* v. *Vanderbilt*, 7 How. Pr. 385.) The decision on the demurrer did not, in any wise, affect defendant's right to appeal from the order denying the change of venue, and charging him with costs of motion. (74 N. Y. 378; 25 id. 203.)

EARL, J. The plaintiff was a creditor of the Rochester Iron Manufacturing Company and commenced this action against the defendant, who was president of the company, to collect of him his debt against the company, on the ground that the annual report filed and published by him, as required by sec-

tion 12 of the act, chapter 40 of the Laws of 1848, was false in its material representations. The place of trial was stated in the complaint to be St. Lawrence county. The defendant answered, and with his answer served a demand that the place of trial be changed from the county of St. Lawrence to the county of Monroe. A few days after such demand, the plaintiff demurred to one of the defenses set up in the answer. About the same time, the plaintiff not having consented to the change demanded, the defendant served notice of motion for such change, with an affidavit setting forth the names of a number of material witnesses residing in Monroe county, and he based his motion both upon the ground of the convenience of witnesses and the claim that that county was the proper county for the trial. Both the demurrer and the motion came on to be heard at the same Special Term. The court overruled the demurrer, on the ground that the complaint did not state a cause of action, giving plaintiff leave on payment of costs to amend his complaint, and it denied defendant's motion, with ten dollars costs, giving no reason for such denial. The defendant took no appeal from the order denying his motion, and paid the ten dollars. The plaintiff paid the costs imposed upon him, and served an amended complaint. The defendant again answered, serving with his answer a new demand that the place of trial be changed to the county of Monroe. This demand not having been complied with, he made a motion to change the place of trial to that county, which was denied. He then appealed to the General Term, and there the order appealed from was affirmed, on the ground, as stated in the opinion there pronounced, that a similar motion had previously been made and denied, no leave having been granted to renew the motion. He then brought this appeal to this court.

Section 12 of the act of 1848 makes it the duty of every manufacturing company organized under that act to file and publish a report, which shall contain the matters prescribed, which report shall be signed by the president and a majority of the trustees, and verified by the oath of the president or secretary. Section 15 provides that if such report "shall be

false in any material representation, all the officers who shall have signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they are stockholders or officers thereof." The claim of the plaintiff is that the defendant, with other officers of the company, made and filed a false report, and he seeks to make him liable in this action for his debt against the company under that section. That such an action is a penal action, is no longer open to question in this court. The statute imposes upon the officers of such a company, as a penalty for a false report, liability for the debts of the company. (*Merchants' Bank* v. *Bliss*, 35 N. Y. 412; *Jones* v. *Barlow*, 62 id. 202; *Wiles* v. *Suydam*, 64 id. 173.) The defendant therefore claims that as the iron company was located in Monroe county and the false report was made and filed there, that county was the proper county for the trial of the action, under section 983 of the Code, which provides that an action to recover a penalty or forfeiture imposed by statute must be tried in the county "where the cause of action or some part thereof arose." This cause of action arose in Monroe county. The false report was there made and filed, and the penalty was there incurred. The learned counsel for the plaintiff, however, claims that as the debt against the company had its origin in St. Lawrence county, some part of the cause of action arose there. But the defendant was not primarily liable for that debt. He did not create it, or in any way obligate himself to pay it. The cause of action against him is the false report, and nothing else. That, and that only, gave the right to sue him. That is the cause of his liability, and that cause arose in Monroe county. Jurists have found much difficulty in precisely defining a cause of action. (Pomeroy on Remedies, § 452.) It may be said to be composed of the right of the plaintiff and the obligation, duty or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action. Here the false report, the wrong of the defendant, gives the plaintiff the right to enforce the penalty. It is true that in a suit to recover the penalty, the plaintiff to sustain his action must prove not only

the false report, but the debt against the company. This is so because the statute imposes no specific penalty for its violation. The debts are the measure of the penalty, and they must be proved for that purpose.

Monroe county was, therefore, the proper place for the trial of this action. But it is claimed on behalf of the plaintiff that it was discretionary for the court to grant or refuse the motion; and this claim is based upon provisions of the Code not yet alluded to Section 985 provides that if the county designated in the complaint as the place of trial is not the proper county, the action may notwithstanding be tried therein, unless the place of trial is changed to the proper county upon the demand of the defendant, followed by the consent of the plaintiff or the order of the court. Section 986 provides that if the demand for the change is not complied with within five days, the defendant's attorney may, within ten days thereafter, serve notice of motion to change the place of trial. Section 987 provides that the court may, by order, change the place of trial "where the county designated for that purpose in the complaint is not the proper county;" "where there is reason to believe that an impartial trial can not be had in the proper county;" and "where the convenience of witnesses, and the ends of justice will be promoted by the change." The defendant made his last motion for the change of the place of trial solely upon the first ground, that Monroe was the proper county. The counsel for the plaintiff, however, read in opposition to the motion, affidavits and papers, from which the court might have determined that the convenience of witnesses and the ends of justice would be promoted by refusing the change; and an order denying the motion upon those grounds, it is claimed, would so far rest in discretion as not to be reviewable in this court. But we are of the opinion that the defendant's right to have the place of trial changed was an absolute right, and that his motion to secure that right could not be defeated by showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial in St. Lawrence county. The defendant, in such a case, has the

right to move for the change solely upon the ground that the proper county for the trial is not stated in the complaint, and if he can be met on the motion by affidavits showing that an impartial trial cannot be had in the county to which he demands the change, or that the convenience of witnesses and the ends of justice will be promoted by refusing the change, he may be taken by surprise and cannot be prepared to meet such affidavits. Hence the orderly and regular practice is to order the change upon defendant's motion, and then, if the plaintiff desires a change to any other county, on the grounds stated in the last two specifications of section 987, he must make his motion upon affidavits which the defendant can be prepared to meet. Authority is given in that section not to retain a place of trial, but to change the place of trial. These views as to the proper procedure are, so far as we are informed, in accordance with the uniform practice in such cases in the Supreme Court. (*Park* v. *Carnley*, 7 How. Pr. 355; *Hubbard* v. *Nat. Pro. Ins. Co.*, 11 id. 149; *Int. Life Assur. Co.* v. *Sweetland*, 14 Abb. Pr. 240.) Defendant's motion should, therefore, have been granted, unless the reason given for its denial at the General Term is sound. At the time the first motion was made, the complaint which had then been served contained no cause of action whatever. It was so held by the same court that decided the motion. The motion may have been denied, and for aught we know was denied, as it certainly could properly have been denied, on that ground. The defendant properly acquiesced in that decision. So long as the complaint was held to state no cause of action, it would have been idle for him to continue his efforts, by appeal or otherwise, to procure the change of the place of trial. But the plaintiff, by leave of the court, served a new complaint stating a cause of action, and thus presenting a radically different case. Then, for the first time, a sufficient complaint was served upon the defendant, and he had the right to make another demand for a change of the place of trial, and he could follow it by a motion without leave of the court. Upon the case as it then existed, he had never moved, and there

was nothing in the prior decision which estopped him. The court had not adjudicated upon a complaint stating a cause of action for a penalty that he was not entitled to the change. The doctrine of *res adjudicata* does not apply to adjudications upon such motions as strictly as it does to adjudications by judgment (*Riggs* v. *Pursell*, 74 N. Y. 370); and where the facts have materially changed since a former motion, such motions may be renewed as matter of right. (*Belmont* v. *Erie R'y Co.*, 52 Barb. 639; *Erie R'y Co.* v. *Ramsey*, 57 id. 449.)

We are, therefore, of opinion that defendant's motion ought to have been granted.

The orders of the General and Special Terms should be reversed and the motion granted, with costs of the appeals to the General Term and to this court.

All concur, except DANFORTH, J., who took no part, and RAPALLO, J., absent.

Orders reversed and motion granted.

HERMAN VEEDER *v.* BENJAMIN M. BAKER.

When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order.

It *seems* that the motion should be made in the Supreme Court.

(Argued November 30, 1880; decided December 7, 1880.)

Motion to vacate and set aside a judgment in this action. The material facts appear in the opinion.

J. C. Cochrane for motion.

Edward C. James opposed.

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EARL, J. The defendant made a motion in this action for a change of the place of trial from the county of St. Lawrence to the county of Monroe, on the ground that the action was to recover a penalty incurred by the defendant in Monroe county, and hence that that county was the proper place of trial, under section 983 of the Code. That motion was denied at the Special Term, and the order of the Special Term, upon appeal by the defendant to the General Term, was affirmed. Defendant then appealed to this court, giving an undertaking to stay proceedings in the action. The defendant claims that his undertaking, and an order which he had obtained from a county judge, stayed plaintiff's proceedings in the action. Soon after the appeal to this court, and while such appeal was pending, the plaintiff, having noticed the cause for trial, moved the same for trial at a court held in St. Lawrence county, in the absence of the defendant and his counsel, and took judgment against him for nearly $40,000. Defendant now moves in this court to vacate and set aside the judgment. We have no jurisdiction to entertain the motion. The cause is pending in the Supreme Court. We have jurisdiction only of so much as is brought here by the appeal from the order. The defendant should make his motion in the Supreme Court, and, if he is defeated there, then an appeal to this court may bring before us the question which he now seeks to have us consider.

The motion should be denied, with $10 costs.

All concur except DANFORTH, J., who took no part; RAPALLO, J., absent.

Motion denied.

IN THE MATTER OF AN ATTORNEY.

The power of the court to award a commission without the consent of parties to take the testimony of a witness out of the State, depends entirely on statute, and can only be exercised in the cases therein specified.

The provisions of the Code of Civil Procedure in reference to taking depositions out of the State (§§ 887 *et seq.*), relate to actions only.

In proceedings to disbar an attorney he can only be convicted on evidence

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good at common law, delivered if he chooses in his presence, by witnesses subject to cross-examination.

Accordingly, *held*, that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue, was error; and that the order was not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder."

(Argued November 30, 1880; decided December 14, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made October 22, 1880, affirming an order of Special Term.

This was a proceeding to disbar an attorney for alleged professional misconduct.

The granting of the order appealed from was opposed by said attorney; it directed "that a commission issue according to the form of proceedings prescribed in article second of chapter nine of the Code of Civil Procedure," to take the testimony of a witness out of the State. The order closed with this provision: "And that all questions as to the right to issue such commission, and the legality of the evidence to be taken thereunder, be reserved till the final hearing of the matter before this court."

James L. Bishop for appellant. The power of the court to award a commission depends solely upon statute. (*McColl* v. *Sun Mut. Ins. Co.*, 50 N. Y. 332; *Matter of Whitney*, 4 Hill, 533; *Wood* v. *Howard Ins. Co.*, 18 Wend. 646.) A commission cannot issue in a special proceeding when the statute uses the word "action" only. (*Wood* v. *Howard Ins. Co.*, 18 Wend. 646; *Matter of Whitney*, 4 Hill, 533; *Graham* v. *Colburn*, 14 How. Pr. 52; Laws of 1877, chap. 417). If this proceeding be regarded simply as a motion, no commission can issue. (*Stake* v. *Andre*, 18 How. Pr. 159; S. C., 9 Abb. Pr. 430; *Kodskin* v. *At. & P. R. R. Co.*, 3 Daly, 70; *Huelin* v. *Ridner*, 9 Abb. Pr. 420.) This proceeding is in its nature *quasi* criminal, and hence the policy of the law prohibits the

taking and reception of evidence of this character. (*People* v. *Restell*, 3 Hill, 289; 2 R. S. 731, § 73.)

Samuel Hand for respondent. The order is not appealable. (*Arthur* v. *Griswold*, 60 N. Y. 143, 146; *Chesterman* v. *Eyland*, 74 id. 452, 455; *Anonymous*, 59 id. 313, 315.) The court had power to make the order granting the commission. (Code, §§ 7, 8; *Anonymous*, 59 N. Y. 314.)

DANFORTH, J. The power of the court to admit and to remove attorneys is given by statute (*In re Cooper*, 22 N. Y. 67; *In re Percy*, 36 id. 651), and in either case the proceeding is a special one. If instituted for the latter purpose, the person proceeded against "must be allowed an opportunity of being heard in his defense" (New Code, § 67), and can be convicted only upon evidence good at common law, delivered, if he chooses in his presence, by witnesses subject to cross-examination. (*In re Eldridge*, 82 N. Y. 161.) The order appealed from derogates the protection afforded by that right, for it requires the examination of a witness at a distance from the place of trial, upon written interrogatories, and was granted against the opposition of the accused person. It is clearly not within the statute which authorizes "depositions taken without the State, for use within the State" (New Code, chap. 9, title 3, art. 2), for that relates to actions only, in their various stages, and neither by its terms nor any implication can it be extended to any other mode or form of proceeding. This appears from the Code itself; for as the provision cited limits the commission to an action, so in another place, we find a declaration that "the word action," "when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress and prevention of a wrong, or the punishment of a public offense." (§ 3333, id.) Such is not the character of this case. It is indeed of a public nature and *quasi* criminal (*In re Kelly*, 59 N. Y. 595), but it involves merely the power and control of the court over its officers, and

however terminating will neither enforce nor vindicate a private right, and by this very circumstance is excepted from the class of ordinary prosecutions set on foot by one party against another. Nor was the limitation unintentional. Prior to 1862 the general construction given to similar provisions of the Revised Statutes (2 R. S., part 3, tit. 3, art. 2, chap. 7) had confined their operation to actions and issues joined therein. It was held that the power of the court to award a commission without the consent of parties depended entirely on the statute; (*Wood* v. *Howard Ins. Co.*, 18 Wend. 646; *In re Whitney*, 4 Hill, 533; *McColl* v. *Sun Mut. Ins. Co.*, 50 N. Y. 332.) and that it only extended to a case where the parties were before the court for the prosecution or defense of their rights in the form prescribed by law. A commission was refused, therefore, in a statutory proceeding by a receiver before referees, in relation to claims against an insolvent insurance company (*Wood* v. *Howard Ins. Co.*, 18 Wend. 646); in proceedings where trustees had been appointed under the statute against an absconding debtor, and the latter desired to controvert the claims of creditors (*In re Whitney*, 4 Hill, 533); in supplementary proceedings, under section 292 of the old Code, when the judgment-creditor desired the testimony of witnesses out of the State, material and necessary for him; and in all, the denial was for want of power to grant the application. For the purpose apparently of providing for such and similar cases, the legislature in 1862 (Laws of 1862, chap. 375), amended the then existing statutes in relation to taking the testimony of witnesses out of the State, so that commissions might issue not only in an action, but "in any proceeding pending in any court of record," or "whenever any issue of fact shall have been joined in any such action or proceeding." This statute was, however, repealed in 1877 (Laws of 1877, chap. 417, § 36), and the provisions therein not relating to actions have not been re-enacted. The question before us must be decided upon the statute as it now stands, and it is, I think, the same in principle as that in the cases above cited. It may be conceded, as the learned counsel for the respondent claims,

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that by the new Code (§ 7), the court has power given it "to devise, and make new process and forms of proceeding necessary to carry into effect the powers and jurisdiction possessed by it," but the application of this provision to the case in hand is not perceived. Upon what occasion, and in what manner the power so conferred shall be exercised does not now concern us, for the order itself directs that "the commission issue, according to the form of proceedings prescribed" in the article of the new Code to which I have already referred. No new form or process has been devised, but a power exercised which the legislature has not thought proper to bestow. The order also answers the proposition of the learned counsel for the respondent, that "the commissioner thereby appointed is in a similar position as the referee," for by its terms the deposition taken by the commissioner is to be returned to the referee; the trial before him is stayed only until it arrives, and afterward, it with the other evidence is to be considered by him, and when, upon the materials so furnished, his opinion is formed, the whole evidence together with that opinion is to be reported to the court. It is also true that by the order "the question of right to issue the commission, and the legality of the evidence taken thereunder, is reserved until the final hearing of the matter before the court," but this was without the consent of the appellant, and the order does, in fact, direct the issuing of the commission and the proceedings under it.

We think such reservation does not affect the final character of the order, and as it was made without authority, that it should be reversed, and the motion for commission be denied.

All concur.

Order reversed.

ISAAC N. DEVENS, Respondent, *v.* THE MECHANICS AND TRADERS' INSURANCE COMPANY, Appellant.

A broker who effects insurance under no employment by the insurers, but for a commission paid by them, upon the premiums received, for such

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risks as he procures to be offered and they choose to accept, is not an agent in such a sense that they will be bound by notice to him after policies are issued.

Defendant issued a policy of insurance to plaintiff upon his canal boat, which policy contained a warranty that the boat would be "securely moored in a safe place satisfactory to "defendant from December 10 to April 1st * * * with privilege to lighter in New York harbor during the winter." The boat was laid up during the period specified at a place outside of said harbor. No notice of the laying up was given save to S., an insurance broker, not in defendant's employ, who solicited applications for insurance by it, forwarded them when obtained, and, if accepted, policies were issued, sent to S., who delivered them to the applicants and received commissions thereon. While so laid up the boat was destroyed by fire. In an action upon the policy, *held*, that notice to S. was not notice to defendant; and that there was a breach of the warranty avoiding the policy; also, *held*, that the privilege to lighter did not dispense with the warranty, or justify the omission to give notice.

Plaintiff served the proofs of loss upon the general manager of defendant and asked him if they were all right; he answered that they were, and, upon being asked what was due on the policy, answered, "we considered not any thing, and that it was the carelessness of the captain of the boat." *Held*, that this was not a waiver of the breach, nor did it estop defendant from claiming it.

Brink v. *Han. F. Ins. Co.* (80 N. Y. 108), distinguished.

An insurance company is not deprived of the defense of breach of warranty because, when a claim is first presented, while denying its liability, it omits to disclose the ground of defense or states another ground than that upon which it finally relies; there must be in addition evidence justifying a finding that, with full knowledge of the facts, there was an intention to abandon or not to insist upon such defense, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury.

The policy provided that the acts of the insurer in saving and preserving the property insured should not be considered as affirming or denying any liability under it. Defendant, when informed of the fire, directed the captain of the boat to store the articles saved; *held*, that this was not a waiver of the breach.

(Argued December 2, 1880; decided December 14, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 28, 1879, modifying and affirming as

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modified a judgment in favor of plaintiff, entered upon a verdict.

This action was upon two policies of insurance issued to plaintiff upon two canal boats, one named "James D. Decker," the other "Maggie," insuring among other things against loss by fire.

The only questions upon this appeal were as to the policy upon the "James D. Decker." The facts pertinent thereto appear in the opinion.

Thomas M. Wheeler for appellant. No notice of the laying up of the boat had been given to the defendant as required by the terms of the policy. (*Mead* v. *Northwestern Fire Ins. Co.*, 7 N. Y. 535; *Westfall* v. *Hudson River Fire Ins. Co.*, 12 id. 293; *Williams* v. *People's Fire Ins. Co.*, 57 id. 277, 281; *Rann* v. *Home Ins. Co.*, 59 id. 388; *Savage* v. *Howard Ins. Co.*, 52 id. 504; *Springfield Fire Ins. Co.* v. *Allen*, 43 id. 394.) The notice to Smith was not sufficient, he not being an agent of the company. (*Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 616; *Bush* v. *Westchester Fire Ins. Co.*, 63 id. 531, 535; *Stringham* v. *St. Nicholas Ins. Co.*, 4 Abb. Ct. App. Dec. 315.) If there was any question as to Smith being an agent, it should have been submitted to the jury under the defendant's request. (*Western Trans. Co.* v. *Hawley*, 1 Daly, 327; *McClure* v. *Cain*, 3 Abb. Ct. App. Dec. 76.)

R. W. Peckham for respondent. Defendant having received the proofs of loss and kept them without objection, will be considered to have waived any supposed defect in them. (6 Cow. 404; 3 N. Y. 122; 17 id. 428; 5 Lans. 545; 64 N. Y. 163; 71 id. 396.) Notice to an agent is notice to the company. (*Van Schaick* v. *Ins. Co.*, 68 N. Y. 434; *Partridge* v. *Ins. Co.*, 17 Hun, 95; *Pelton* v. *Ins. Co.*, 19 Alb. L. J. 516.) The facts proved constituted Smith an agent, so far at least as to make a notice to him of the laying up of the boats notice to the company. (*Partridge* v. *Ins. Co.*, 17 Hun, 95.) De-

fendant is estopped from setting up any such defense as a lack of proper notice. (*Brink* v. *Hanover F. Ins. Co.*, 21 Alb. L. J. 295–296, Ct. of App., decided February 24, 1880.)

ANDREWS, J. The policy on the "Decker" contained the following warranty: "Also warranted to be securely moored in a safe place, satisfactory to this company, between noon of the 10th day of December and noon of the 1st of April following, and the company to be duly notified of the time and place of laying up," and following this printed clause was a clause in writing: "Privilege to lighter in New York harbor during the winter." The "Decker" was not used for lightering during the winter, but was laid up at Port Johnson, about twenty miles from New York, from the 25th day of December, 1877, to the 12th day of May, 1878, when she was destroyed by fire, caused by the boiling over of pitch, which the captain was heating in the cabin.

No notice of the laying up was given to the company. A notice was given to one Smith, but this was not notice to the company. Smith acted as insurance broker at Watkins, and solicited applications for insurance in the defendant's company. He was not in the employment of the defendant, but had been accustomed to obtain and forward applications of insurance to the defendant, and if accepted, the company would issue policies, and send them to Smith to be delivered to the applicants. The company, in pursuance of the practice of insurance companies in such cases, paid Smith a commission on policies issued through him. This was the only dealing between Smith and the defendant. The secretary and general manager of the company testified that Smith was not an agent of the defendant. Smith was not examined as a witness. His declaration to the plaintiff, when he solicited the insurance, that he was the defendant's agent, did not bind the company. The case is directly within the decision of this court in *Mellen* v. *The Hamilton F. Ins. Co.* (17 N. Y. 609), in which it was held that a broker who effects insurances under no employment by the insurers, but for a commission paid by them upon the pre-

miums received for such risks as he procured to be offered, and they chose to accept, is not an agent in such a sense that the insurers will be bound by notice to him after the policies are issued.

There was, therefore, a breach of the warranty contained in the policy, and the policy was forfeited thereby, unless as is claimed the privilege to "lighter in New York harbor during the winter," wholly dispensed with the warranty, and justified the plaintiff in omitting to notify the company of the time and place of mooring the boat. This contention cannot be maintained. The privilege granted qualified the absolute undertaking expressed in the previous warranty. It permitted the plaintiff to use the boat in lightering in New York harbor, and if the plaintiff had availed himself of the privilege, there would have been no breach of the warranty so long as the boat was so employed. But if the "Decker" was not so used, the warranty attached, and the plaintiff was bound to moor the boat, and notify the company. No reason can be assigned why the company should dispense with the warranty if the plaintiff did not avail himself of the privilege to use the boat as a lighter. The fair and natural construction of the contract is, that the boat should be moored and notice given, unless the plaintiff elected to use it in lightering as permitted by the policy, and that the plaintiff so understood it, is apparent from his giving notice to Smith, although, by reason of his want of authority, the notice was ineffectual.

There was no waiver of the defense now insisted upon, by what occurred, when the plaintiff served the proofs of loss. They were served by the plaintiff upon the general manager of the company at the office in New York. The plaintiff when he delivered them asked the manager if they were all right, and he said they were, and the plaintiff then asked him how much was due on the policy, and the manager relied, "We considered not any thing, and that it was the carelessness of the captain of the boat." The manager disclaimed any liability on the policy. His omission to put his disclaimer expressly upon the ground of a breach of warranty

in answer to an inquiry as to the amount due to the plaintiff was not a waiver of this defense. The case is quite different in its circumstances from the case of *Brink* v. *The Hanover F. Ins. Co.* (80 N. Y. 108). In that case proofs of loss were served on the company, and the company retained them and examined the insured in respect to them, and decided not to pay the loss upon the ground of fraud, and so declared to the assured. Thereupon the action was commenced, and at the trial the company failing to prove the fraud, sought to raise the question that the proofs had not been served in time, and the court held that the company by their conduct had waived this defense. CHURCH, Ch. J. said: "They may refuse to pay without specifying any ground, and insist upon any available ground, but if they plant themselves upon a specified defense, and so notify the assured, they would not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it." The doctrine of waiver was, we think, properly applied in that case, but it should not be extended so as to deprive a party of his defense, merely because he negligently, or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury. Neither of these positions can be affirmed upon the evidence in this case. The statement of the manager was not inconsistent with an intention to insist upon the defense now made. When the conversation occurred, the loss had not become payable. If, at the time the manager had in mind the breach of warranty in not notifying the company of the time and place of mooring the boat, he may have regarded the fact that the fire was caused by the carelessness of the captain, as bearing

upon the equity of this defense, and have made the statement to justify the denial of liability. But however this may have been, there was, we think, no sufficient evidence to establish either a waiver or an estoppel.

Nor was the direction of the defendant to the master of the boat to store the anchors and other articles saved, a waiver of the defense now made. The policy provides that the acts of the insurers in saving and preserving the property insured shall not be considered as affirming or denying any liability under the policy.

We think the court erred in directing a verdict, and that the judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

THE UNION DIME SAVINGS INSTITUTION, Respondent, *v.* WILLIAM E. ANDARIESE, Appellant.

A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (§ 184, sub. 4), and an advertisement of the premises for sale is a "seizure" within said provision.

Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, advertised premises for sale upon a day after his term had expired, *held*, that he had authority and was bound to proceed with and complete the sale.

(Argued December 2, 1880; decided December 14, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, in favor of plaintiff, rendered December 8, 1879, upon a case submitted under section 1279 of the Code of Civil Procedure. (Reported below, 19 Hun, 310.)

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The substance of the facts stated is as follows:

In actions brought by plaintiff to foreclose mortgages upon lands situate in the county of Kings, judgments of foreclosure and sale were perfected December 18, 1878; by the judgments the sales were directed to be made by the sheriff of said county. The then sheriff, whose term of office expired December 31, 1879, on the day the judgments were perfected, advertised the lands for sale thereunder on the 10th day of January, 1879, and on that day sold them, the plaintiff becoming the purchaser. On May 27, 1879, the parties entered into a contract by which plaintiff agreed to sell and convey and defendant to purchase said lands. Defendant refused to perform the contract upon the ground that plaintiff was not seized of and could not convey a good title for the reason that the person making the sale was not, at the time, sheriff of the county of Kings and had no power to sell.

Joseph A. Burr, Jr., for appellant. The sheriff had no power to complete the sale after the expiration of his term of office. (1 Rev. Laws, p. 490, § 11; 2 N. Y. Stat. at Large [Edmunds' ed.], p. 200, § 157; Laws of 1840, chap. 38, § 1; Laws of 1847, chap. 280, § 77; Code, § 287; Laws of 1877, chap. 417, §§ 4, 21; Code of Civil Proc., § 1242; id., §§ 183, 184; Laws of 1876, chap. 449, § 2; Throop's Code, § 184, note.) No levy or seizure had been made by him. (Bouvier's Law Dict., tit. "Levy;" *Wood* v. *Colvin*, 5 Hill, 228; *Colt* v. *Phœnix Ins. Co.*, 54 N. Y. 595; *Kent* v. *Roberts*, 2 Story's C. C. 592; *Hall* v. *Crocker*, 3 Metc. 245; *Fitch* v. *Tyler*, 34 Me. 463; *Rodgers* v. *Bonner*, 45 N. Y. 379.) The sale cannot be sustained as a sale by Albert Daggett, as referee. (*Kerrigan* v. *Force*, 68 N. Y. 381.)

Wm. Henry Arnoux for respondent. The sheriff had the same right to sell after expiration of his term of office that he had under the Revised Statutes. (Laws 1876, chap. 439, p. 467; 3 R. S. [6th ed.] 723, 724; Code of Civil Procedure, §§ 184, subd. 4, 186; *Wood* v. *Colvin*, 5 Hill, 228; *Newman* v. *Beck-*

with, 61 N. Y. 205; Crocker on Sheriffs, § 6.) The judgment of foreclosure and sale was a mandate in the hands of the sheriff. (2 Bouvier's Law Dict. 108; 2 Jacobs' Law Dict., tit. Mandate; chap. 449, § 2, ¶ 2, Laws of 1876; Bliss' Code, 903.) Taking proceedings under a judgment in equity against real property is a seizure in the eye of the law. (*Rodgers* v. *Bonner*, 45 N. Y. 379; *Burckhardt* v. *McClellan*, 15 Abb. 243, note, Ct. of App.; *Perrin* v. *Everitt*, 13 Mass. 128; *Grosley* v. *Allen*, 5 Greenl. 455; *Taylor* v. *Mixter*, 11 Pick. 341.) Giving notice of the sale required by the statute is sufficient and is the seizure and levy. (*Rodgers* v. *Bonner*, 45 N. Y. 379; Crocker on Sheriffs [2d ed.], § 500; *Wood* v. *Colvin*, 5 Hill, 228; *Hall* v. *Crocker*, 3 Metc. 245, 250; *Fitch* v. *Tyler*, 34 Me. 463; 4 Wait's Pr. 50.)

MILLER, J. By the Code of Procedure (§ 287) it was declared that real property adjudged to be sold must be sold in the county where it lies, by the sheriff, or by a referee appointed by the court for that purpose. By chapter 439, Laws of 1876, it was enacted that all sales of lands made in the county of Kings under a judgment or decree of any court, except in the cases enumerated, shall be made by the sheriff of said county. The new Code (Title IV) makes provisions in regard to the duties and liabilities of an incoming and an outgoing sheriff; and it is declared that within ten days after the service of a certificate upon the sheriff whose term is about to expire, he must deliver to his successor "all mandates then in his hands, except such as he has fully executed or has begun to execute by the collection of money thereon, or by a seizure of or levy on money or other property in pursuance thereof" (see § 184, subd. 4), but "must proceed with and complete the execution of such mandate which he has begun to execute" (§ 186). The sheriff advertised the real estate described in three decrees made upon the foreclosure of mortgages to be sold on the 10th day of January, 1879, and sold the same accordingly. The certificate provided for by the Code was delivered to him before the sale, and the question to be determined is, whether,

under the provision cited, he had lawful authority to sell. We think that there was a seizure of the real estate within section 184, which authorizes him to make the sale, and the decrees in question were mandates in his hands, according to the provisions of section 2 of chapter 449, Laws of 1876, under and by virtue of which he had advertised the real estate for sale. He had thus obtained control over the property for the purpose of a sale. No formal levy is necessary in selling land under an execution or order of the court, and the right of the officer to make the sale becomes perfect upon the delivery of the execution. It is then seized for the purpose of enforcing the judgment or decree. The same rule applies, we think, upon a foreclosure decree. By the advertisement the seizure became complete and rendered the property subject to the decree. In case of an attachment, it was held that to constitute a levy upon real estate, nothing more is required to be done by the officer than some act with intent to make the property liable to the process, and that this will constitute a seizure and create a lien against the debtor. (*Rodgers* v. *Bonner*, 45 N. Y. 379.) The same rule, we think, applies here; and within the provisions cited, a seizure had been made under the mandate or the decree of the court, and the sheriff had authority and was bound to complete the sale. This construction is, we think, in accordance with the intention of the legislature; for were it otherwise, the sheriff, who was by statute authorized to make the sale, would have no authority to complete it, while a referee appointed would have full power for that purpose. This clearly never could have been intended.

We have given due weight to the various points and suggestions made by the appellant's counsel, but we think that none of them are sufficient to authorize a reversal of the judgment and that it must be affirmed.

All concur except RAPALLO, J., absent.

Judgment affirmed.

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THE CHENANGO BRIDGE CO., Respondent, *v.* CLINTON I. PAIGE et al., Executors, etc., Appellants.

The bed and banks of a fresh water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement.

The legislature, except under the power of eminent domain, can interfere with such a river only for the purpose of regulating, preserving and protecting the public easement.

Any person owning land on both sides of the river may without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement.

Such owner, however, cannot, without legislative authority, maintain a bridge or ferry for public use.

A wrong motive in erecting a structure otherwise lawful does not make the structure itself unlawful or a nuisance; an unlawful use thereof may be complained of and restrained, but the structure cannot be destroyed.

Plaintiff was incorporated to build a bridge over the C., a fresh water river; by its charter (chap. 119, Laws of 1808) the building of any other bridge by others within two miles of the bridge to be erected by it was prohibited. Plaintiff's exclusive right, however, could only be exercised while its bridge was passable. Plaintiff erected such bridge and maintained it. Thereafter the B. B. Co. was incorporated, and by the act of incorporation (chap. 164, Laws of 1855) was authorized to build a bridge within two miles, and did build one within 100 rods of plaintiff's bridge, and maintained it as a toll bridge for public travel. L., defendant's testator, was one of the principal promoters of the B. B. Co., its president and largest shareholder; he built the bridge by contract with the company, and aided in maintaining it and keeping it in repair up to his death. Plaintiff, claiming that its charter constituted a contract, and that so far as the charter of the B. B. Co. authorized it to maintain a bridge for public travel, it was a violation of that contract, and so void, commenced suit against that corporation in 1856, to restrain it from constructing, using or allowing its bridge to be used for public travel, etc. Plaintiff was defeated in the courts of this State (27 N. Y. 87), but on appeal to the U. S. Supreme Court the judgment was reversed (3 Wall. 51), that court holding as claimed by plaintiff. In 1865, two years after the death of L., the bridge of the B. B. Co. was swept away by an unprecedented flood, it was carried down against plaintiff's bridge, and swept that away. This action was brought to recover damages for the destruction of plaintiff's bridge, and for the loss of tolls. *Held*, that plaintiff was not en-

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titled to recover for the loss of its bridge; that the B. B. Co. had the right to erect its bridge, and could maintain it for public travel whenever plaintiff's bridge was impassable; the structure itself was, therefore, neither unlawful nor a nuisance when maintained with proper care, even if built designedly as a toll-bridge for public travel, but *held* that L. was liable for the wrongful diversion of tolls from plaintiff's bridge; that as the charter of the B. B. Co. so far as it authorized it to maintain its bridge for public travel was unconstitutional and void, it afforded no protection to those acting under it.

Also, that the provision of the Revised Statutes (2 R. S. 602, § 66) providing that where a construction has been put upon a statute by the Supreme Court every act done in good faith in conformity to that construction after such decision, and before reversal, shall be so far valid as to excuse from liability for a penalty or forfeiture, did not apply, as the action was not to enforce a penalty or forfeiture.

Also *held*, that even if the charter of the B. B. Co. was wholly void, so that those who built the bridge had no corporate protection, then the bridge would be considered as built by individuals having the rights of riparian proprietors, and as they could lawfully build it for their own use, it was not a nuisance or unlawful.

C. B. Co. v. *Paige et al.* (8 Hun, 292), reversed.

(Argued December 2, 1880; decided December 14, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of plaintiff, entered upon an order made September 20, 1876, denying a motion for a new trial, and directing judgment on a verdict. (Reported below, 8 Hun, 292.)

The nature of the action and the material facts appear in the opinion.

E. Countryman and Stephen C. Millard for appellants. The court erred in refusing to hold that the construction of the bridge and the conduct of the Binghamton Bridge Company, having been sustained by the courts, defendants' testator was protected thereby, although such decision has since been reversed. (2 R. S. [1st ed.] 602, § 66; 3 id. [3d ed.] 703; 1 Kent's Com. 476; *Brown* v. *Crowl*, 5 Wend. 298; *Langley* v. *Warner*, 3 Comst. 327; *Simpson* v. *Hornbeck*, 3 Lans. 54; *Davis* v. *Marshall*, 14 Barb. 96; *Harris* v. *Jex*, 55 N. Y. 421;

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66 Barb. 232.) The company having become the owner of land on both sides of the river owned the bed of the stream, and had, even without the special consent of its sovereign, the right to build a bridge on its own land, spanning the stream, and owed no duty to the public except to refrain from interfering with the navigation of the river. (*Ex parte Jennings*, 6 Cow. 527, 543; *The People* v. *Gutchess*, 48 Barb. 656; *The People* v. *Platt*, 16 Johns. 195; *Ft. Plain Bridge Co.* v. *Smith*, 30 N. Y. 44; 16 Ohio [Griswold], 540; 2 Wis. 308; 4 id. 497; 30 How. Pr. 357, 358; Angell on Highways, §§ 54, 56, 65, 66; Thompson on Provisional Remedies, 248, 240; *Yates* v. *Milwaukie*, 10 Wall. 497; 2 Pars. on Cont. 523; *Hepbern's Case*, 3 Bland's [Md.] Ch. 98.) As a mechanical structure the bridge and its builders were free from all blame. (*Barclay* v. *The Commonwealth*, 25 Pa.; *Moody* v. *B'd of Sup'vrs of N. Co.*, 46 Barb. 660, 666; *Auburn & Cato Plk. Road Co.* v. *Douglass*, 5 Seld. 446; *Ely* v. *Sup'vrs of N. Co.*, 36 N. Y. 300; 63 Barb. 117; 27 N. Y. 87.) The Binghamton bridge was not a common, public or private nuisance. (4 Black. Comm. 166; Shearm. & Redf. on Negligence, 394; *Myers* v. *Malcolm*, 6 Hill, 292; 2 Black. 218; *Ft. Plain Bridge Co.* v. *Smith*, 30 N. Y. 62; *Lansing* v. *Smith*, 8 Cow. 153; 3 Black. 214; Hilliard on Torts, 632; 18 Barb. 222; 13 J. & S., 646; *Harris* v. *Thompson*, 9 Barb. 364; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 220, 259; *Mohawk Bridge Co.* v. *U. & S. R. R. Co.*, 6 Pa. 565, note *a*.)

O. W. Chapman for respondent. The charter of the Binghamton Bridge Company was null and void. (*Chenango Bridge Co.* v. *Binghamton Bridge Co.*, 3 Wall. 71; *S. C.*, 30 How. 358.) The charter, being null and void, could give to Lewis no protection against plaintiff's claim for actual damages caused by his acts under such pretended charter. (Wood on Nuisances, 788, § 750.) When Lewis built the Binghamton bridge within two miles of plaintiff's bridge, he was engaged in an unlawful act (3 Wall. 71; 30 How. 346, 358), and the bridge so built being an invasion of plaintiff's legal rights, was a nuisance to

plaintiff. (Wood on Nuisances, 897, § 867.) The building of the bridge being an unlawful act and a nuisance, Lewis was responsible to plaintiff for any injury plaintiff might suffer by reason of such building, irrespective of any negligence in construction or maintenance. (*Losee* v. *Saratoga Paper Co.*, 42 How. 392; *Irvine* v. *Wood*, 51 N. Y. 224, 487; *Hay* v. *Cohoes Co.*, 2 id. 159; *Congreve* v. *Smith*, 18 id. 79, 84; *Hudson R. R. Co.* v. *Loeb*, 7 Robt. 424; Wood on Nuisances, 111, § 108.) The act under which the Binghamton bridge was built and maintained shows that it was built simply and solely as and for a toll bridge, which was unlawful. (*Meeker* v. *Van Rensselaer*, 5 Wend. 397; *Aiken* v. *Benedict*, 39 Barb. 400; *Fry* v. *Prentice*, 14 L. T. [N. S.] 298; 3 Hill, 621–624; affirmed, 7 id. 575; 23 Barb. 459; 5 Seld. 450; 13 Wend. 261; 63 Barb. 115; *Chipman* v. *Palmer*, 77 N. Y. 56; Wood on Nuisances, 144, § 144.) In any event plaintiff was entitled to recover for the tolls of which it was deprived by reason of Lewis' erection and maintenance of this bridge. (Wood on Nuisances, pp. 82, 88, § 77; p. 881, § 842; p. 885, § 850; *Thompson* v. *Gibson*, 7 Mees. & Wels. 456; 2 Hilliard on Torts, 417 [3d. ed.]; *Vandenburg* v. *Truax*, 4 Den. 464; *Chipman* v. *Palmer*, 77 N. Y. 56.) The judge was right in declining to hold that inasmuch as the courts of this State had sustained the charter of the Binghamton Bridge Company, Hazard Lewis was protected, even though the Supreme Court of the United States had reversed these decisions of our courts. (8 Hun, 292, 295, 296; 3 Wall. 71; 30 How. Pr. 346, 358; Wood on Nuisances, 788, § 750.) The judge was right in refusing to hold "that this is not a cause of action which survives against the representatives of the wrong-doer." (63 Barb. 111; 8 Hun, 292; 2 R. S. 447, m. p., § 1; *Elder* v. *Bogardus, Ex.*, Hill & Den. 116; 2 R. S. 447, § 1, m. p.) The judge was right in declining to hold that the building of the bridge was not in itself an unlawful act or nuisance, and it was only the use of the bridge that was unlawful and a nuisance. (3 Wall. 71; 30 How. Pr. 346, 358; 63 Barb. 111.) The judge was right in declining to rule and decide that de-

fendant's bridge "was a lawful structure, and that, therefore, the plaintiff cannot recover upon that part of the claim." (3 Wall. 71; 30 How. Pr. 346, 358; 63 Barb. 111, pt. 3.) The judge was right in declining to charge the jury that plaintiff could not recover for the diversion of tolls beyond a period of six years previous to bringing suit, and that plaintiff is limited to the tolls diverted during such six years. (2 R. S. 448, § 8; 63 Barb. 111; *Scovil* v. *Scovil*, 45 Barb. 517.) The judge was right in declining to charge that the use to which the Binghamton bridge "was put does not affect the defendant's liability for the taking away of the plaintiff's bridge." (Angell on Water-courses, § 402; *Fish* v. *Dodge*, 4 Den. 311.) An action for the erection of a nuisance does not outlaw, for it is continuous, and is as if it were a new erection daily. (*Rosewell* v. *Prior*, Salk. 459; 12 Mod. 639; *Thompson* v. *Gibson*, 7 Mees. & Wels. 456; *Fish* v. *Dodge*, 4 Den. 311; *Conhocton Stone Road* v. *Buff., N. Y. & E. R. Co.*, 51 N. Y. 573, 581, 582; *Clancy* v. *Byrm*, 56 id. 134, 135; *Rosewell* v. *Prior*, 12 Mod. 639.) Executors can be sued for the tort of their testator causing injury to property. (2 R. S. 447, §§ 1, 2; *Elder* v. *Bogardus, Ex., etc.*, Hill & Den. 116; *Mahon, Ex.*, v. *N. Y. C. R. R. Co.*, 24 N. Y. 458; *Scott* v. *Shepherd*, 2 W. Bl. 892; *McAfee* v. *Croford*, 13 How. [U. S.] 447; *Vandenbury* v. *Truax*, 4 Den. 464.)

EARL, J. The plaintiff was incorporated by the act chapter 119 of the Laws of 1808, to build and maintain a bridge over the Chenango river, and by its charter it was provided that it should not be lawful for any person or persons to erect any other bridge over the same river within two miles either above or below the bridge to be erected by the plaintiff. Soon after its incorporation, the plaintiff erected a bridge over the river at Binghamton and maintained it until it was swept away, as hereinafter mentioned.

In 1855, by the act chapter 164 of that year, the Binghamton Bridge Company was incorporated to build a bridge over the same river. It was authorized to build its bridge within

two miles of plaintiff's bridge, at a point not less than eighty rods above it, and to take tolls for the use of the same, and it was empowered to purchase, take and hold real estate for the purpose of its bridge. In 1855 and 1856, it built its bridge less than one hundred rods above plaintiff's bridge and maintained it as a toll bridge for public travel until it was swept away, as hereinafter mentioned.

Hazard Lewis, defendants' testator, was one of the principal promoters of the Binghamton Bridge Company, and one of its largest stockholders. He was a director of the company from its organization and its president from 1858 to the time of his death, on the 2d day of July, 1863. He built the bridge by contract with the company, and aided in maintaining it and keeping it in repair to the time of his death.

The plaintiff, claiming that its charter constituted a contract that the legislature would not license or authorize the construction of any other bridge over the river within two miles of its bridge, and that the charter of the Binghamton Bridge Company, so far as it authorized that company to maintain a bridge for public travel, was a violation of that contract and therefore null and void, in 1856 commenced an action against that company, praying in its complaint for judgment that the defendant therein be perpetually enjoined from constructing, using or allowing its bridge to be used for public travel, and from receiving any tolls or compensation for crossing its bridge, and that it be required to remove or shut up the same, so that it could not be used to the injury of the plaintiff, and also praying for damages. That action was brought to trial and the plaintiff was defeated. It then appealed to the General Term of the Supreme Court, and then to the Court of Appeals, and the judgment against it was affirmed, those courts holding that there was not such a contract as plaintiff claimed, and that the charter of the Binghamton Bridge Company gave it valid authority to build and maintain its bridge for public travel. (27 N. Y. 87.) The plaintiff then appealed to the Supreme Court of the United States, where the judgment of the State courts was, in December, 1865, reversed. (3 Wall. 51.) That

court held that plaintiff's charter constituted an inviolable contract that the legislature would not authorize or license the erection of another bridge within the limited distance, and that, so far as the charter of the Binghamton Bridge Company authorized it to maintain its bridge for public travel, it was null and void.

In March, 1865, nearly two years after the death of Lewis, there was an unprecedented flood in the Chenango river, and it swept away the bridge of the Binghamton Bridge Company, and that was carried down the stream against plaintiff's bridge and swept that away. Four years afterward, in 1869, this action was commenced against the executors of Lewis to recover damages for the destruction of plaintiff's bridge and for loss of tolls. The theory upon which the plaintiff sought to maintain the action was that the upper bridge was an unlawful structure — a nuisance — and that as Lewis built it and aided during his life-time in maintaining it, his estate could be made liable for the damage caused thereby to the plaintiff. The action was brought to trial, and plaintiff recovered for the loss of the bridge and the loss of some tolls. Its judgment was, upon appeal to the General Term, reversed upon a question of evidence. (63 Barb. 111.) A new trial was then had. There was no claim upon the trial that the upper bridge was carelessly or improperly built or maintained. The undisputed proof showed that that bridge was swept away by a flood in the river greater and more violent than had ever been known there before. The trial judge sustained the theory upon which the plaintiff commenced its action, and holding that there was no dispute in the evidence as to the amount of plaintiff's damages, directed a verdict in its favor for $8,200 for damages to its bridge and $785.94 for damages by reason of the diversion of tolls from its bridge. The defendants then appealed to the General Term of the Supreme Court, where the judgment was affirmed (8 Hun, 292), and then they brought this appeal to this court.

The main question to be determined by us is whether the plaintiff was entitled to recover the large sum awarded to it for

the destruction of its bridge. We are of opinion that it was not.

The Chenango river is a fresh water stream. It is the private property of the riparian owners. The public, in such streams, have an easement only for navigation and for floating logs and timber. As well said in *Ex parte Jennings* (6 Cow. 518): "The public right is one of passage, and nothing more, as in a common highway. It is called by the cases an easement; and the proprietor has a right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law imposes upon him." And when the case between these two bridge companies was first before this court (26 How. Pr. 124), Judge SMITH, in an opinion written by him, said: "The Chenango river is a fresh water stream, in which the tide does not ebb and flow, and is, therefore, a private river. The riparian proprietors own the bed and banks. As early as 1798 it was declared a public highway, but subject to the public easement for the purpose of navigation. The riparian owners might make such use of it as they pleased; might bridge and dam it, except as prohibited by acts of the legislature, and might cross it with ferries, except as so forbidden."

The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these fresh water streams than over other private property. It may make laws for regulating booms, dams, ferries and bridges, only so far as is necessary to protect and preserve the public easement; and when it goes further, it invades private rights protected under the Constitution. (*Canal Com'rs* v. *The People*, 5 Wend. 423, 448; *Penn* v. *Wheeling & Belmont Bridge Co.*, 18 How. [U. S.] 421, 432; *Morgan* v. *King*, 35 N. Y. 454.)

Any person owning the land upon both sides of such a river

can maintain a ferry or bridge or dam for his own use, provided he does it so as not to interfere with the public easement, without any authority from the legislature, and even in defiance of a legislative prohibition. In such case he would but be making a proper use of his own property. Such use must, however, be such as not to interfere with the rights of other riparian owners. And there is one more limitation: He cannot, without legislative authority, maintain a bridge or ferry for public and general use, because public highways and toll bridges and toll ferries are subject to legislative regulation and control. As said by Judge DAVIS in 3 Wall.: "The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for 'it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation.'"

Now what rights did the legislature give the plaintiff by its act of incorporation? It made it a corporation, and gave it the corporate right to build its bridge. For that purpose only a corporation was not needed, nor was legislative sanction needed. But being authorized by the legislature to build the bridge, it could not be complained of for any necessary interference with the public easement which was under legislative control; for that which is authorized by law cannot be a public nuisance. (*Crittenden* v. *Wilson*, 5 Cow. 165; *The People ex rel. Murphy* v. *Kelly*, 76 N. Y. 475, 482.) It was also authorized to maintain the bridge for public travel, and to take tolls for the use of the bridge; and these it could not do without legislative authority. The legislature did not empower it to interfere with the stream, except so far as was

necessary for the building and maintenance of its bridge, and gave it no authority, and could give it no authority, except under the power of eminent domain upon compensation, to interfere in any way with riparian rights of owners above or below its bridge.

What rights were conferred upon the Binghamton Bridge Company by the act of 1855, incorporating it? That act unquestionably made it a corporation, and it had all the rights and powers conferred upon it by the act against the whole world except the plaintiff. No one but the plaintiff could assail any of its corporate rights, so long as its bridge was properly and safely maintained, so as not unnecessarily to interfere with the public easement. The plaintiff's bridge might have been swept away, or might have been abandoned by it, or it could, for a consideration, have surrendered its exclusive right to the Binghamton Bridge Company; and in such case that company could have exercised all its corporate franchises in a proper manner, without question from any source. The plaintiff's charter gave it the exclusive right between the limits specified, only while its bridge was passable. The Binghamton Bridge Company could, therefore, under its charter maintain its bridge for public travel, without violating plaintiff's rights, while its bridge was not in condition to be used for public travel. How far, then, did the act of 1855 violate the contract made with the plaintiff in its act of incorporation? Not by authorizing the construction of the bridge. That, as a structure, did no harm to the plaintiff. As a bridge it invaded none of its rights. As to it the bridge was neither unlawful nor a nuisance; and the plaintiff could not complain of its existence so long as it was maintained with proper care and skill. There was a lawful purpose for which the legislature as against the plaintiff could have authorized its construction, to wit: to be used for public travel while its bridge was not passable.

But suppose we are wrong in holding that the charter of the Binghamton Bridge Company was not wholly null and void; and suppose that it was wholly invalid, so that those who built the bridge had no corporate protection whatever; what

then follows? Then the corporation must be regarded as non-existent, and the bridge was built by those concerned in the supposed corporation as individuals having the rights of riparian owners. They could build the bridge for their private use as riparian owners, or they could build it for no use and permit it to stand as a monument of their folly; and so long as it did not interfere with the public easement or with riparian rights, it would neither be a nuisance nor unlawful.

It is said, however, that there was no proof that the Binghamton Bridge Company owned the lands on both sides of the river where it built its bridge. There was proof that it owned the land upon one side, and as its bridge had been maintained for ten years, it must be presumed that it owned the land upon the other side or occupied it by the license of the owner. But even if it did not own the land upon either side, and hence had trespassed upon the lands of others, the plaintiff cannot complain of, and has no concern with, such trespasses.

But it is strenuously contended by the learned counsel for the plaintiff that, as the upper bridge was built designedly as a toll bridge for public travel, it thereby became unlawful and a nuisance. His argument on this branch of his case was quite ingenious, but, we cannot doubt, was unsound. His contention is, that the unlawful use cannot be separated from the structure, and that the structure was a nuisance and could have been abated as such, because it was built and used for an unlawful purpose. This contention finds no warrant in the decision of the Federal court reported in 3 Wallace. It was not there decided that the bridge itself was a nuisance or unlawful, and no such question was before that court. The improper use of the bridge, which was claimed to be justified under the charter of the Binghamton Bridge Company, was the matter there in controversy. A wrong or unlawful motive in erecting a building otherwise lawful does not make the building itself unlawful or a nuisance. In such case the unlawful use may be complained of, restrained or abated, but the building cannot be destroyed. Take two cases somewhat analogous to this: Suppose one erects upon his own land a house intended to be

used as a bawdy house, and while it is being so used it is blown down without any fault of the owner, and injures the adjoining property of another who had the right to complain of the use of the house as a nuisance; could the party thus injured sue the owner of the house for the injury to his property? Or suppose one erects upon his own land a steam boiler manufactory, and carries on therein the business of manufacturing boilers in such a way as by the noise to make his business an actionable nuisance to one living upon the adjoining lot; and suppose the building is blown down without his fault, and injures the neighboring property; can the owner thereof recover for the injury thus done him? It is plain that these questions must be answered in the negative. In both of the cases supposed, the buildings are lawful structures, and it is the use only which could be complained of, and the use has nothing whatever to do with the injury. So here the bridge was a lawful structure, and it was its use only which was unlawful, and such use had nothing whatever to do with the destruction of plaintiff's bridge. To further illustrate these views a few cases may be referred to. In *Barclay* v. *The Commonwealth* (25 Penn. 503), WOODWARD, J., said: "Where an erection or structure itself constitutes the nuisance, as where it is put up in a public street, its demolition or removal is necessary to the abatement of the nuisance; but where the offense consists in a wrongful use of a building, harmless in itself, the remedy is to stop such use, not to tear down or remove the building itself." In *Moody* v. *Supervisors of Niagara Co.* (46 Barb. 659), it was held, that the fact that a house is kept as a place of prostitution is sufficient to render it a public and common nuisance; that a house cannot be lawfully destroyed by a riot or mob, merely because, for the time being, it is devoted to a purpose which the law characterizes as a common nuisance, and that for the purpose of abating a nuisance, so much only of the thing as causes the nuisance should be removed; and that where it is the wrongful use of the building that constitutes a nuisance, the remedy is to stop such use, not to tear down or demolish the building itself. To the same effect are

Ely v. *Supervisors of Niagara Co.* (36 N. Y. 297), and *Babcock* v. *City of Buffalo* (1 Sheldon, 317, affirmed in 56 N. Y. 268). In *Phelps* v. *Nowlen* (72 N. Y. 39), it was held, that a party is not liable for the consequences of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, simply because he was influenced in the doing of it by wrong and even malicious motives.

We conclude, therefore, that there was error in awarding to the plaintiff damages for the destruction of its bridge.

But the damages for the wrongful diversion of tolls from plaintiff's bridge stand upon a different footing. It was wrongful to maintain and use the upper bridge for public travel as a toll bridge. In using or allowing the bridge to be used for that purpose, the owner thereof infringed upon the rights of the plaintiff secured to it under its charter, and did it an actionable injury, and the damages for such injury must be measured by the amount of tolls diverted. As a wrong was thus done to the plaintiff, we can see no reason for not applying the general rule, that all persons who are engaged in a wrongful or unlawful act are liable for the consequences thereof, whether they act as principals or as agents. The testator, Lewis, was active in building and maintaining the bridge for the purpose of the use to which it was subjected. He was a director from the organization of the Binghamton Bridge Company, and its president at the time the tolls were taken for which he has been held, and he was a large stockholder in that company. He was actively engaged in resisting the suit brought by this plaintiff against that company, and was fully notified of plaintiff's claim that that company had no right to allow public travel or take toll upon that bridge. In these acts, there was enough *prima facie* at least to make him liable as a wrong-doer within the rule above stated, unless he was shielded by considerations now to be noticed. It is claimed that he could not be a wrong-doer for acting under an act of the legislature. But that act was unconstitutional, so far as it authorized the maintenance of that bridge for public travel. An unconstitutional

act is as if it had never been passed by the legislature. It can confer no rights and afford no protection. As said by Judge Cooley, in his work on Constitutional Limitations, at page 188: "When a statute is judged to be unconstitutional, it is as if it had never been. Rights connot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force." Therefore whether Lewis must be considered to have acted for himself as a stockholder, or as an agent of the stockholders or of the corporation, the statute furnished him no protection.

It is further said that as all the State courts had held that the bridge could be lawfully maintained under the act of the legislature, and as their decision was not reversed by the Federal court until after the tolls in question had been taken, such decision in some way furnished him protection; and our attention is called to section 66 of article 1, title 3, chapter 9, part 3 of the Revised Statutes (2 R. S. 602), which provides, that "whenever, by the decision of the Supreme Court, any construction has been or may be given to any penal or other statute, every act done in good faith, in conformity to such construction, after such decision was made, and before a reversal thereof by the court for the correction of error, shall be so far valid, that the party doing such act shall not be liable to any penalty or forfeiture for any such act that shall have been adjudged lawful by such decision of the Supreme Court." It is sufficient to say that this is not an action to enforce any penalty or forfeiture, and therefore not within that section. The legislature did not intend to relieve a party, under the circumstances mentioned, from the consequences of his acts violating private rights, and it would probably not have had the power to do so, even if it had so intended. When Lewis was con-

cerned in taking these tolls, he had notice of plaintiff's claims and acted at his peril.

The amount of tolls received by the Binghamton Bridge Company was sufficiently proved. The book kept by the treasurer of the company was produced, and that was the book in which such tolls were entered. The entries were made by the treasurer, who was dead at the time of the trial, and such entries were against his interest, as they charged him with the amount of such tolls. They were, therefore, admissible for the purpose of showing the amount of tolls received by that company. (1 Greenl. Ev., § 120.)

The amount of tolls thus received was *prima facie* evidence of the amount of tolls diverted from the plaintiff, as that bridge was within one hundred rods of plaintiff's bridge, and there was no other bridge over the same stream below plaintiff's bridge, or above it within five or six miles.

It follows from these views, that plaintiff's judgment should be reversed and a new trial granted, costs to abide event; unless it will stipulate to reduce its judgment by striking therefrom the $8,200 and the interest thereon; and in case of such stipulation, the judgment for the balance should be affirmed, without costs to either party in this court.

All concur except MILLER, J., who did not sit.

Judgment accordingly.

CHRISTOPH SCHWINGER, Respondent; *v.* ALONZO B. RAYMOND et al., Appellants.

Where a common carrier performs his contract to transport and deliver goods, a payment of the freight or a submission to judgment therefor does not preclude the owner of the goods from recovering damages for injuries thereto while *en route;* he may pay the freight and sue for the damages, or set up his damages by way of counter-claim in an action to recover the freight or he may bring a cross-action.

A shipper, by consenting that his goods may be carried on deck, does not thereby assume the risk of loss or injury to them.

Statement of case.

Where a carrier by canal neglects to protect his cargo, or to furnish means by which it may be done, according to his contract, and the cargo in consequence is injured by frequent rains, this does not constitute a marine disaster, and he is liable for the damages.

Where the findings of fact, by a referee, conflict, the defeated party is entitled to those most favorable to him and may rely upon them in aid of exceptions to the referee's conclusions of law.

Where findings contained in the case, as settled by a referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand. (Code of Civil Procedure, § 997.)

This action was brought to recover freight agreed to be paid for transporting 200 barrels of beans on the deck of a canal boat to New York. Defendant's answer admitted the agreement to pay the freight and the transportation, but alleged that, through the negligence of the plaintiff, the beans were wet and damaged, and asked judgment for the damages, less the freight. At the close of the trial defendants' counsel submitted certain propositions of fact and law, "each and every" of which he requested the referee to find as stated. The conclusions of law were: 1st. That plaintiff was "entitled to recover" the amounts claimed for freight; 2d. That defendants were "entitled to recover" a sum specified for their damages; 3d. That defendants were "entitled to judgment" for the balance. The referee found the first proposition, but refused to find the other two; to the refusal to find defendants' counsel excepted, but did not except to the finding. The General Term, on appeal, *held*, that the finding, in accordance with the request and the omission to except thereto, entitled plaintiff to maintain his judgment. *Held*, error; that the three propositions so submitted should have been taken together and construed as one sentence, and so taken, the request was that defendants have judgment upon the adjustment of the two claims, for the difference between them; and that, therefore, defendants were entitled to a review of the refusals to find and the referee's conclusions of law.

The referee found that plaintiff undertook to furnish lumber sufficient to cover and shelter the beans while on the boat so that they would be perfectly protected from rain; that they were delivered to him in good order; that the captain of the boat was warned that it was about to rain and requested to procure lumber; that he refused and left the place where they were loaded, while defendants' agent was absent, without any covering whatever over the beans; that it rained during the voyage and, in consequence of the want of sufficient covering, the beans were wet and damaged, and the referee found the amount of loss in consequence. *Held*, that these findings established error in the refusal of the referee to find the conclusions of law as requested.

Also, *held*, that the fact that defendants knew the beans were not covered when the boat departed did not excuse the plaintiff.

(Submitted December 2, 1880; decided December 14, 1880.

Opinion of the Court, per DANFORTH, J.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made on the 1st Tuesday of April, 1879, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts appear sufficiently in the opinion.

E. Darwin Smith and *D. C. Hyde* for appellants. The referee erred in not finding as requested, that defendants were entitled to recover damages. (*Dunham* v. *Bower*, 77 N. Y. 80; *Dakin* v. *Oxley*, 33 L. J. C. B. 115–119; 1 Pars. on Mar. Law, 172; 3 Kent, 225; 3 Johns. 321; *McAlister* v. *Reab*, 4 Wend. 483; affirmed by Court of Errors, 8 Wend. 109; *Gillespie* v. *Torrance*, 25 N. Y. 309; *Bellinger* v. *Craigue*, 31 Barb. 534; 1 Lans. 61.) The referee erred in his second conclusion of law, that the defendants were not entitled to be allowed for damages in this action. (48 N. Y. 369.) The Supreme Court cannot grant a new trial on the ground of mistake, inadvertence, surprise, newly-discovered evidence or fraud, after judgment at General Term. (Code, § 1002; *Smith* v. *Frankfield*, 13 Hun, 490; *Comstock* v. *Dye*, id. 113; *Whitbeck* v. *Waine*, 8 How. 433; 2 Cow. 408; 3 How. 250; *Bennett* v. *Lake*, 47 N. Y. 93; *Kenyon* v. *N. Y. C. R. R.*, 76 id. 607; Code, § 724; *Hatch* v. *C. N. Bk.*, 78 N. Y. 490; *Luke* v. *Lynde*, 2 Burrows, 882.)

Geo. W. Cothran for respondent. A carrier is not liable for injury to deck freight. (*Lawrence* v. *Minturn*, 17 How. [U. S.] 100, 114, 115; *Barber* v. *Brace*, 3 Conn. 9; 3 Kent's Com. 240 and note *d*; Redfield on Carriers, § 337; Maclachlan on Shipping, 354, 355, 376.)

DANFORTH, J. The action was brought to recover freight agreed to be paid by defendants to plaintiff for transporting on the deck of his canal boat 200 barrels of beans, from Albion and Brockport to the city of New York. The complaint alleges that the beans were transported under this agree-

ment, and delivered to the defendants, who accepted them. That the freight has not been paid, "wherefore the plaintiff demands judgment against the defendants for $110, with interest." The defendants admit an agreement to pay freight, but allege that the plaintiff's undertaking was to "carry and deliver the beans in such manner that they would be entirely protected from moisture;" that he did carry them to the place agreed upon, but in such a careless and negligent manner they were wet, sprouted, greatly damaged, and a loss was by reason thereof sustained by them (respondents), to the amount of $1,008.94, "no part of which has been paid by the plaintiff, nor have the defendants paid the freight aforesaid, amounting to $110, and the defendants demand judgment for this sum of $1,008.94, and interest, less $110, and interest."

To this new matter the plaintiff interposed a reply, and thereby controverted and denied "all the allegations thereof." There was then, at the outset of this litigation, an understanding on both sides of the matters really in controversy, and the issues made by these pleadings were fully litigated. It was the theory of the defendants, as indicated by the answer above set out, and especially by their prayer for judgment, that the plaintiff was entitled to have allowed to him the freight agreed upon, and they should have allowed their damages; but judgment be given only for so much thereof as should remain after canceling the freight agreed upon. It was in pursuance of the same theory that the legal adviser of the defendants, at the close of the trial, submitted to the referee in writing a series of propositions of fact which he deemed established, and conclusions of law which he supposed would follow, with the request to find the facts and law as they were stated, "and each and every of the same, and each and every part thereof." The proposed conclusions of law were stated in these words: "*First.* That the plaintiff is entitled to recover of the defendants, $159.77. *Second.* The defendants are entitled to recover damages of the plaintiff in the sum of $1,452.10. *Third.* The defendants are entitled

to judgment against the plaintiff in a balance of $992.33, and their costs." Thus reproducing, in separate clauses, the idea already embodied in a single sentence of the answer, for the sums named are the items there referred to with interest added. The referee seems to have had the same understanding of the case, for by his report he finds: *First.* That the plaintiff is entitled to recover the amount agreed to be paid as freight on the beans, and, stating the amount, directs judgment to be entered therefor, in favor of the plantiff. *Second.* That the defendants are not entitled to recover, or to be allowed in this action as against the plaintiff for the damage and injury to their property before mentioned. And answering the requests of the defendants before stated, found the first, but refused to find the second and third. The defendants excepted to the conclusions of law contained in the report, and to the referee's refusal to find the second and third requests. Upon appeal the General Term held that the finding of the referee, upon the first clause, in accordance with the request of the defendants, and the omission of the latter to except thereto, entitled the plaintiff to maintain the judgment, and to that effect is the respondent's argument before us. We think it is unsound. The three propositions submitted to the referee should be taken together, and construed as one sentence, with several members. Such, evidently, was the intention of the draftsman. The first and second specifications were but premises upon which the conclusion stated in the third paragraph rested. Taken as a whole, the request was for a finding that the defendants have judgment upon the adjustment of the two claims stated in the first and second paragraphs. In substance that the freight be allowed to the plaintiffs, the damages allowed to the defendants, and judgment ordered for the difference. The defendants did not ask that the plaintiff have judgment, but that he be deemed "entitled to recover of the defendants" the sum named; the defendants "entitled to recover damages of the plaintiff, and have judgment for the balance." Put these requests in one sentence,

and there could be no misapprehension in regard to its meaning. It seems to us equally plain as stated by the defendants. And so the referee must have thought, for in his report he uses the words as synonymous, and finds that the defendants are not entitled "to recover or to be allowed" as against the plaintiff, the damages. Upon exceptions to the refusals to find, and exceptions to the conclusions of law stated in the report, the defendants should have been permitted to review the correctness of those findings. But in any view of the case undue effect was given by the learned judges of the Supreme Court to the admission implied in the request to find that the plaintiff was entitled to his freight. There are cases in which two claims could not co-exist; where if the plaintiff was entitled to have his claim allowed, the defendants would be precluded from recovering, and among them are *Davis* v. *Tallcot* (2 Kern. 184), *Bellinger* v. *Craigue* (31 Barb. 534), *Gates* v. *Preston* (41 N. Y. 113), *Blair* v. *Bartlett* (75 N. Y. 150, cited by the learned court). They went upon the ground that the plaintiff's cause of action could be made out only by overcoming the defendants' claim, that if the latter was well founded it would defeat the former, and a recovery by either would be a conclusive answer to any demand made by the other, because the litigation provoked by either, would necessarily involve the matter upon which both must rely, and it could not be again litigated. Thus a recovery by a physician or surgeon of his fees for services rendered (*Bellinger* v. *Craigue*, *Gates* v. *Preston*, *Blair* v. *Bartlett*), or by a manufacturer for the price of the machine (*Davis* v. *Tallcot*), would bar an action by the patient in the first case, or the purchaser in the second, for damages by reason of non-performance of the contract upon which the fee or price depended, because, except upon proof, or admission of performance, the plaintiff could not have recovered. And if in the case before us the defendants had set up a claim for non-delivery or transportation of the goods, a recovery, or an admission of the plaintiff's right to recover for freight earned under the contract, would have justified the

same conclusion. But that is not the case. The plaintiff did perform the contract to carry, and the goods reached their destination. He had thus performed the condition on which his right to freight depended, and he might have retained the property until payment was made, or waiving that right, deliver it, and look to the consignee or to the shipper for its payment. To the owner of the injured goods, several ways were open. He might pay the freight and sue for damages, or refusing to pay, submit to suit, set up his damages by way of counter-claim, or bring a cross-action. (*Gillespie* v. *Torrance*, 25 N. Y. 309; *Spalding* v. *Vandercook*, 2 Wend. 432; *Batterman* v. *Pierce*, 3 Hill, 171; *Dunham* v. *Bower*, 77 N. Y. 80.) And a payment of freight, or a submission to judgment therefor, would afford the carrier no answer to the counter-claim or to the action. (1 Parsons' Maritime Law, 215; 3 Kent, 225; *Griswold* v. *The New York Ins. Co.*, 3 Johns. 321.) The distinction between the facts of this case and the cases first referred to is in like manner indicated in *Dunham* v. *Bower* (*supra*). Since the Code, the defendants may have affirmative and complete relief by first extinguishing the plaintiff's cause of action, and judgment for the excess. It was to that end that the answer of the defendants was framed, and to complete their purpose the requests referred to made. We think the exceptions were sufficient to entitle them to review the decision of the referee.

In the second place, the referee erred in his conclusion that the defendants were not entitled to recover damages against the plaintiff. The plaintiff was a carrier. He undertook with the defendants to transport their beans upon the deck of his canal boat to New York, for a price named, "to be paid on the delivery of the beans in that city." The referee finds that he undertook at the same time to furnish lumber sufficient to cover and shelter the beans while on the boat, so they would be perfectly protected from rain and moisture; that they were delivered to him in good order, part at Albion and part at Brockport; that his agent, the captain, received and loaded them upon the deck; that he was warned it was about

to rain, requested to procure lumber, and informed that if it did rain, and the beans were not covered, they would be damaged; that he refused to cover them, and left each port "without the means to do so, or so arranging the barrels that they could be covered, and while the defendants' agent was absent." He was more than once requested to procure lumber and cover the beans, and repeatedly promised to do so, but did not. The boat left Brockport at night, or very early in the morning, without any covering whatever over any of the barrels of beans, without notice to the defendants and without their knowledge. At various times between Albion and New York it rained, and, "because of there being at first no covering over the beans, and because of the defective condition and insufficiency of the covering afterward constructed by the captain, the beans became wet, and when they arrived in New York city a portion thereof, by reason of such wetting, had become soft, and sprouted, and seriously damaged, and the whole of said beans were, in consequence thereof, in an unmerchantable condition;" that the consignees refused to receive the beans by reason of their ill condition, and then the captain had them stored "for account and risk of the boat and owners thereof." Thereafter, at the joint request of the plaintiff and defendants, the consignees took and cared for the beans, and at like request sold the same as they best could, and paid over the net avails to the defendants. The referee further finds the depreciation and injury, and expenses to be over $800. These findings were made at the defendants' request; they verify the counter-claim, and are in themselves sufficient to establish error in the referee's refusal to find that the defendants were entitled to recover for damages so sustained, less freight, and to judgment for the balance against the plaintiff.

In the referee's report there are findings of less fullness and somewhat conflicting with those referred to, but where they vary the defendants are entitled to those most favorable to themselves, and may rely upon them in aid of their exceptions. Moreover, the findings I have above stated are contained in the case as settled by the referee, and if they differ from those

in the report, must still be held to be correct and represent his final conclusions. It is upon the case that the exceptions stand. (New Code, § 997; *Tompkins* v. *Lee*, 59 N. Y. 662.) It is argued by the respondent that the carrier is not liable for deck freight, and the shipper assumes the risk of loss or injury to his goods, when he consents that they be so carried. The authorities to which we are referred do not sustain the position. In case of jettison, the deck load cannot claim from the insurers, and there may be other modifications to the remedy of the owners of such a cargo, as between themselves and other shippers. But there was no jettison in this case and it has not yet been held that summer showers, however frequent, constitute a marine disaster, or that the failure of the carrier by canal to protect his cargo, or to furnish means by which it may be done, according to his contract, are to be reckoned among the perils of the sea. The carrier is liable upon his contract according to its terms. It is also urged by the plaintiff that the defendants knew, when the boat departed, that the beans had not been covered and that the lumber furnished was insufficient to cover them, and there is color for this assertion in the referee's report; not in the case as settled. If this was so, it would not excuse the plaintiff, for his contract was to protect the goods during the entire trip, not merely at the moment of departure.

Upon the findings of the referee the defendants were entitled to recover, and he erred in refusing to find the conclusions of law as requested, and in making the conclusion of law which gave judgment to the plaintiff.

This result makes it unnecessary to review the order denying a new trial for surprise also referred to in the notice of appeal.

The judgment of the General Term and that entered on the report of the referee should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

MILO C. OSBORN, Appellant, *v.* HENRY B. SCHENCK et al., Respondents.

The fact of the possession and use by one of two tenants in common of personal property, of the property so held, even though it prevents the possession and use by the other, furnishes no ground to the latter for an action for conversion.

It seems, however, that if the possession develops into a destruction of the property, or of the interest of the co-tenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment, or if it ends in a sale of the whole property, ignoring the rights of such co-tenant. then a conversion is established.

A purchaser, however, from the co-tenant who has assumed to sell the whole property is not made liable simply from his purchase and claim to be sole owner.

Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants gave them, as security, a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half, and plaintiff the other half. The payments stipulated in the mortgage were fixed so as to correspond, in amounts and dates, with the rents reserved in the lease which was looked to, to discharge the mortgage debt. In an action for conversion of plaintiff's interest, *held*, that the taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P.; that the effect of the mortgage was simply to vest the interest of P., upon default, in defendants.

Defendant H. B. S., after default, removed the machine from the possession of the lessees, claiming a right so to do. It appeared that no demand was made upon him before suit brought, and until after that time he neither did nor said any thing in denial of plaintiff's right as co-tenant. *Held*, that the taking possession was simply the exercise of defendants' rights as co-tenants, and neither made the defendants jointly nor H. B. S. individually liable.

Benedict v. *Howard* (31 Barb. 569), *Van Doren* v. *Balty* (11 Hun, 239), distinguished.

(Argued December 3, 1880; decided December 14, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, made May 6, 1879, reversing a judgment in favor of plaintiff, entered upon a verdict and granting a new trial. (Reported below, 18 Hun, 202.)

Statement of case.

This action was brought to recover damages for the alleged conversion of a one-half interest in a planing machine.

The machine in question, in October, 1872, was owned by plaintiff and one Platt as tenants in common. On the fifteenth of that month they leased the building in which it was and the machinery therein for a term of five years. On or about that day Platt, being indebted to defendants, to secure such indebtedness, executed to them a chattel mortgage upon the whole of said machine; he, however, informed defendants that plaintiff owned one-half, and the payments secured, in amounts and dates, were made to correspond with the payments of rent reserved in the lease, from which source it was expected that the moneys to pay the mortgage debt would be obtained. Default having been made in the payment secured by the mortgage defendant Henry B. Schenck removed the planing machine from the premises so leased to a building owned by defendants, and upon being inquired of he said "they had a right to take it and did take it away."

Further facts appear in the opinion.

Samuel Hand for appellant. The tenant in common of chattels can maintain trover against his co-tenant, where such co-tenant has exercised exclusive dominion over the common property, claiming it as his own, or has lost, sold, or destroyed it. (*Wilson* v. *Reed*, 3 Johns. 178; *Hyde* v. *Stone*, 9 Cow. 232; *Mumford* v. *McKay*, 8 Wend. 444; *White* v. *Stone*, 21 id. 72; *Tyler* v. *Taylor*, 8 Barb. 585; *Benedict* v. *Howard*, 31 id. 569; *Van Doren* v. *Balty*, 11 Hun, 239; Freeman on Co-tenancy, §§ 307, 308, 317; *Delaney* v. *Root*, 99 Mass. 547; *Wheeler* v. *Wheeler*, 33 Me. 349; *Dyckman* v. *Valiente*, 42 N. Y. 549; *Strickland* v. *Parker*, 54 Me. 264.) Platt's sale to defendants consisted of the plaintiff's interest, for which trover lies against either of the wrong-doers. (*Van Doren* v. *Balty*, 11 Hun, 239, *supra*; *Waddel* v. *Cook*, 2 Hill, 47 and note *a*; *Dyckman* v. *Valiente*, 42 N. Y. 549, *supra*; Freeman on Co-tenancy, §§ 310, 311 and notes.) As affecting the plaintiff's interest in the planer, the sale by Platt to the de-

fendants was void, and the removal of the common property into a neighboring county by the defendants, accompanied with a claim of an exclusive right thereto and a refusal to account to the plaintiff for his interest therein, was a destruction of that interest. (*Benedict* v. *Howard*, 31 Barb. 569; Freeman on Co-tenancy, § 313; *Delaney* v. *Root*, 99 Mass. 547; *Dyckman* v. *Valiente*, 42 N. Y. 449; *Williams et al.* v. *Merle*, 11 Wend. 80.) An action for the conversion could be maintained by either the lessor or lessee, and it would be absurd to permit the defendants to set up their own wrong as a defense. (*Smith* v. *James*, 7 Cow. 328; *Austin* v. *Hudson R. R. Co.*, 25 N. Y. 334, 340, 341, etc.; 2 Greenl. on Ev. [13th ed.], § 616, and note; *Carter* v. *Burr*, 39 Barb. 59; *Christopher* v. *Austin*, 11 N. Y. 216.)

J. A. Griswold for respondents. There was not a conversion by defendants so as to enable the plaintiff to maintain this action. (*Fiero* v. *Betts*, 2 Barb. 633–635; *Gilbert* v. *Dickerson*, 7 Wend. 450; *Wilson* v. *Reid*, 3 Johns. 178; *St. John* v. *Standing*, 2 id. 468; *Fenning* v. *Lord Glenville*, 1 Taunt. 241; *Fobes* v. *Shattuck*, 22 Barb. 569.) Receiving the mortgage by defendants from Platt did not constitute a conversion by the mortgagees. (*The Matteawan Co.* v. *Bentley*, 13 Barb. 64; *St. John* v. *Standing*, 2 Johns. 467–469; *Gilbert* v. *Dickerson*, 7 Wend. 449; *Dyckman* v. *Valiente*, 42 N. Y. 501; Freeman on Co-tenancy, § 311.) To maintain an action for the conversion of property, the plaintiff must show that he either had the actual possession or was entitled to the immediate possession at the time of the alleged conversion. (3 Phillips on Ev. 220; *Whitcomb* v. *Hungerford*, 42 Barb. 177–185; 6 Bacon's Abr. title Trover, [C] 682.)

FINCH, J. When, and for what cause, one of two or more tenants in common of personal property may maintain trover against those retaining its possession is sufficiently clear on principle, but not always of easy application to confused and varying facts. The right of each to the use and possession of

the property is precisely the same, and neither can have or exercise a superior authority over the other. It follows necessarily that the mere fact of such possession and use by one, even though it prevents the use and possession of the other can furnish no ground of action, since it is rightful, and rests upon a lawful authority. But it also follows that if that possession develops into a destruction of the property or of the interest of the co-tenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment by him, or ends in a sale of the whole property which ignores and denies any other right, then a conversion is established and trover may be maintained against the wrong-doer. The earlier cases on the subject hesitated to decide that a mere sale of the whole of the common property by one of the owners was sufficient proof of a conversion (*Wilson* v. *Reed*, 3 Johns. 176; *Hyde* v. *Stone*, 9 Cow. 230; *Mumford* v. *McKay*, 8 Wend. 444), and the loss or destruction of the property, so that it had passed out of the reach of the injured party, was to some extent coupled with the fact of a sale as furnishing the ground of an action. But in *White* v. *Osborn* (21 Wend. 75), the rule freed itself from any such incumbrance, and it was decided that the sale of the whole property which ignored and denied the right of the co-tenant, furnished sufficient proof of a conversion. That case has been steadily followed and the doctrine is now fully established. (*Tyler* v. *Taylor*, 8 Barb. 585; *Van Doren* v. *Balty*, 11 Hun, 239; *Delaney* v. *Root*, 99 Mass. 547; *Wheeler* v. *Wheeler*, 33 Me. 348; *Dyckman* v. *Valiente*, 42 N. Y. 560.) The application of that rule to the case before us makes it possible to say that the plaintiff could have maintained trover against Platt who was his co-tenant, although there were modifying circumstances which create a doubt. The two were owners in common of a planing machine which, with the building in which it stood and other appliances, they had leased to tenants for a term of years. Platt, being indebted to the defendants, gave them a chattel mortgage upon the whole machine as security for the debt. But when he did so he explained to them

that he was but the half-owner, and that the plaintiff owned the other half, and the payments reserved in the mortgage were shaped in amounts and date of maturity to correspond with the stipulated payments of rent which were looked to as the means of discharging the mortgage debt. The execution and delivery of this mortgage was a conditional sale of the property, which upon default ripened into an absolute title. It is claimed that this transaction constituted a conversion of the plaintiff's interest, for which trover would lie against either of the wrong-doers. That may be true as to Platt. The general language of his mortgage was presumptively evidence of a total sale (*White* v. *Osborn*, *supra*), but the notice given of part ownership in another, and the arrangement made for an application of the rents to the extinguishment of the mortgage debt, indicate a purpose, not to deny or ignore the right of the co-tenant, and so qualify the inference to be drawn from the broad language of the mortgage. If, however, it be conceded that Platt was liable for a conversion because he mortgaged the whole property, it does not follow that the defendants were also wrong-doers, and equally liable. Assuredly their mere acceptance of the mortgage did not amount to a conversion. (*Matteawan Co.* v. *Bentley*, 13 Barb. 641.) The mortgage by itself in no manner interfered with plaintiff's interest. It transferred no title to that interest. The cases which authorize an action for conversion expressly concede that only the interest of the vendor passes to the purchaser. Upon default title to the interest of the mortgagor became vested in the defendants. Nothing more than that could pass; nothing more did pass. If no other event had happened than the mere acceptance of this mortgage by Schenck, that fact alone would not have made him liable for a conversion. (*St. John* v. *Standring*, 2 Johns. 467; *Gilbert* v. *Dickerson*, 7 Wend. 449; *Dyckman* v. *Valiente*, *supra*; *Dain* v. *Cowing*, 22 Me. 347.) The case last cited states the rule plainly that the purchaser from a co-tenant who had assumed to sell the whole property was not liable without proof of a conversion other than that arising out of his becoming a purchaser and claiming to be sole owner.

Schenck, therefore, was not liable for a conversion when he accepted the mortgage. He acquired a lien by that instrument only upon the interest of Platt, and after default, becoming vested with that interest, was a tenant in common with plaintiff, and his further action must be tested accordingly. The question now comes, whether that action made him liable in trover. The sole thing he did was to remove the machine from the possession of the lessees to his own. The only claim he made was that he took it and had a right to take it. There is no evidence that he used it. No demand was made of him before the action was brought. He neither did nor said any thing in denial of plaintiff's right as a co-tenant until after he was sued. He neither sold it nor destroyed it, nor so appropriated it as to bar any future enjoyment of it by plaintiff. In taking it he only exercised his admitted right as a co-tenant. He asserted no exclusive dominion over it. That assertion was not made until driven to an answer after action commenced for a conversion, and even then was not urged or intimated upon the trial. The defense was rested wholly and alone upon the right of the defendant as a co-tenant. To sustain his liability in this case we must practically abrogate the rule so long and thoroughly established, of the absolute equality of right of tenants in common, and hold that the mere taking possession of the common property by one, coupled with an assertion of his right to do so, is a wrong for which trover may be maintained. No case goes that length. In all there was some additional and decisive fact beyond the possession and claim of right to retain it. There was either a destruction of the property itself or of the power of beneficial enjoyment by the co-tenant. In *Benedict* v. *Howard* (31 Barb. 569), there was a practical destruction of the property as personal by changing it into real, and so barring the possibility of future use by the co-tenant. There was no such destruction of the property or the power of beneficial enjoyment in this case. In *Van Doren* v. *Balty* (11 Hun, 239), the mortgagee of half presumed to sell the whole at public auction, and the purchaser who was sued used and claimed it as his own, denying any other right and refus.

ing to deliver it on a demand. No sale has been made by the mortgagees here; there has been no demand and no refusal, and not even a claim of exclusive right. These were the cases most relied upon to sustain the right of action, but do not justify the inference sought to be drawn from them.

The difficulty is intensified when we pass beyond Schenck, who took the machine, and consider the case as against the two other defendants. There is a total absence of evidence as against them. We may guess or believe that they are partners of Schenck, but the fact can scarcely be said to be proved. If a wrong was done they neither joined in its commission, authorized the act, nor ratified it when done. Their sole connection with the transaction is that the mortgage was made to "John B. Schenck's Sons," and they probably were members of that firm.

It is unnecessary to discuss other questions. The views already expressed justify the reversal by the General Term. That order should be affirmed, and judgment absolute upon the stipulation be rendered in favor of the defendants.

All concur, except RAPALLO, J., absent.

Order affirmed and judgment accordingly.

THOMAS A. DAVIES, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondents.

A municipal corporation or a county has the power to lease real estate when the use thereof is needed to carry out any of its acknowledged powers and purposes.

In May, 1872, in pursuance of a resolution of the board of supervisors of the county of New York directing it, a lease was executed by the mayor of the city and by plaintiff, by which the latter leased to the city certain rooms as chambers for the recorder, for one year; that officer occupied them until July, 1877, and delivered up the keys to plaintiff about May 1st, 1878. The rent was paid by the comptroller of the city at the rate named in the lease, up to November 1, 1876. In December, 1876, under a resolution of the board of aldermen, other rooms were set apart for the recorder, but because they were unfit for occupancy he did not take

Statement of case.

possession of them until June or July, 1877 In May, 1877, plaintiff was notified by the comptroller that the city would not be held liable after May 1st of that year. In an action brought to recover rent accruing after November 1st, 1876, *held*, that the recorder having been placed in possession under the lease by the board of supervisors, whose duty and power it was to procure him chambers, it was to be presumed that it acquiesced in his continuance in possession after the expiration of the lease; that the board, having the power originally to take the lease, had the power also, with the consent of the landlord, or without his dissent, to hold over after the term had expired; that by acquiescing in the action of the recorder the board exercised this power, and the lease was thus renewed from year to year, and that plaintiff was entitled to recover.

Also *held*, that such a renting did not fall within the phrase "work or supplies" for which there must be, under the city charter of 1873 (§§ 92, 112, chap. 335, Laws of 1873), a letting by contract to the lowest bidder and certificate of necessity from the head of a department.

Also *held*, conceding that upon the adoption of the resolution of December, 1876, by the board, the continuance in occupation by the recorder was no longer permitted, plaintiff was at least entitled to the rent for the balance of the rental year, *i. e.*, to May 1, 1877.

The K. & I. Co. v. *The Mayor* (4 Bosw. 80), distinguished.

Davies v. *Mayor, etc.* (13 J. & S. 373), reversed.

(Argued December 8, 1880; decided December 14, 1880.)

APPEAL from judgment of the General Term of the Superior Court, of the city of New York, entered upon an order made November 3, 1880, overruling plaintiff's exception and directing judgment on a verdict. (Reported below, 13 J. & S. 373.)

The nature of the action and the facts appear sufficiently in the opinion.

Edmund Coffin, Jr. for appellant. The mayor, aldermen and commonalty may be held liable as a tenant at sufferance holding over after the expiration of the term. (*Witt* v. *The Mayor*, 5 Robt. 248; 6 id. 441; *Schuyler* v. *Smith*, 51 N. Y. 309, 316; 1 Hilliard on Real Property, 394; 4 Kent's Com. 117; *Conway* v. *Starkweather*, 1 Denio, 113; *Hume* v. *The Mayor*, 74 N. Y. 264; *McGaffin* v. *City of Cohoes*, id. 387; *Brown* v. *The Mayor*, 66 id. 385; *Farmers' Loan and Trust Co.* v. *Mayor*, 4 Bosw. 80; *McCloskey* v. *City of Albany*,

7 Hun, 472; *Moore* v. *The Mayor*, 73 N. Y. 238.) The mayor, aldermen and commonalty of the city of New York were under legal obligation, at the times mentioned in the complaint, to provide chambers for the recorder and to pay for them. (Chap. 367, Laws of 1872, vol. 1, p. 908; chap. 137, Laws of 1828, § 23; Valentine's Laws, 637; Laws of 1852, § 1; chap. 304, Laws of 1874, 360; *Schenck* v. *Mayor, etc.*, 67 N. Y. 44.) The board of supervisors properly contracted a liability for rent of these chambers in 1872, for one year at the annual rent of $2,000 for use of the recorder. (*Thomas* v. *Nelson*, 69 N. Y. 118; *Dorr* v. *Barney*, 12 Hun. 259.)

D. J. Dean for respondent. The resolution proven on the part of the defendant was insufficient to authorize the alleged lease. (*People* v. *Edmonds*, 15 Barb. 529; *Halstead* v. *The Mayor*, 3 N. Y. 430; *Baker* v. *The Mayor*, 9 Abb. Pr. 82; *White* v. *The Mayor*, 2 Legal Observer, 26; *People* v. *Stout*, 23 Barb. 338.) The act of the recorder, retaining possession of the premises after the expiration of the term, could impose no liability upon the county. (Laws of 1873, chap. 335, § 112.) A municipal corporation is not bound by the unauthorized act of its official. (*M'Donald* v. *The Mayor*, 4 N. Y. Sup. Ct. 177; *S. C.*, 68 N. Y. 23; *Burns* v. *The Mayor*, 5 N. Y. 371; *Brady* v. *The Mayor*, 20 id. 312; *S. C.*, 2 Bosw. 173; *Donovan* v. *The Mayor*, 33 N. Y. 291; *Hodges* v. *Buffalo*, 2 Denio, 112; *Appleby* v. *The Mayor*, 15 How. 428; *Supervisors* v. *Bates*, 17 N. Y. 242; *Smith* v. *The Mayor*, 10 id. 538; *Ellis* v. *The Mayor*, 1 Daly, 102; *Bonesteel* v. *The Mayor*, 22 N. Y. 162; Dillon on Municipal Corporations, §§ 272–381; *Supervisors of R.* v. *Ellis*, 59 N. Y. 620.)

FOLGER, Ch. J. This is an action brought to recover rent. The plaintiff showed on the trial that he owned premises in New York city, known as rooms Nos. 1, 2, 3, in No. 317 Broadway; that the board of supervisors of the county of New York, which was then made up of the mayor, the recorder,

and the aldermen of that city (Laws of 1870, chap. 190, § 1, p. 481) on the 13th May, 1872, by a resolution entered in the minutes kept of the proceedings of the board, directed that a lease be executed of those rooms, for the purpose of chambers for the recorder, for one year from May 1st of that year, at an annual rent of $2,000; that a lease was executed by the mayor of the city, and by the plaintiff for that term and at that rent of those rooms; that the recorder became the occupant of them, and continued so to be until in July, 1877, and delivered the keys to the plaintiff about 1st May, 1878; that rent was paid to the plaintiff by the comptroller of the city, at the rate named in the lease, up to 1st Nov. 1876; that no rent was paid to him by the city after that date; that he was notified by the comptroller in May, 1877, that the city would not be held liable after the first day of May of that year; and that he rented the rooms to other tenants on the first day of May, 1878. The defendant showed that the board of aldermen and mayor on 28th December, 1876, set apart rooms in a building of the city as chambers for the recorder. The plaintiff showed that the recorder did not take possession of those rooms until in June or July, 1877, by reason of their unfit state for occupancy.

The plaintiff was nonsuited at the trial, and that action of the trial court was sustained at the General Term.

The consideration we have given to the case leads us to a different result.

We have no doubt that a municipal corporation, such as is the city of New York, or a *quasi* corporation, such as is a county in this State, has the power to enter into a lease and become a tenant of real estate, when the use thereof is needed to carry out any of its acknowledged powers, and to attain the public purposes for which it was erected. (*Inhabitants, etc.* v. *Wood*, 13 Mass. 193.) We speak of the city of New York, and also of a county, because it is not clear in the case to which the lease made by the plaintiff was given. The written paper was not produced at the trial. The plaintiff was asked if he ever had in possession a paper purporting to be

a lease executed on behalf of the city, and said that he thought that he had. He said that it was executed by the mayor; that he could not testify as to the seal; that it was indorsed "Mayor, Aldermen and Commonalty of the city of New York." This is all the testimony as to the party which took the lease. It does not matter at this day, so far as liability is concerned, whether it was the county of New York or the defendant, for in 1874 the two were united as one body politic and corporate, and the city was made answerable for all the liabilities and obligations of the county (Laws of 1874, chap. 304, § 1, p. 360), and no arrears of rent are claimed that accrued before 1st November, 1876. To be sure, the complaint avers a lease made and entered into by the city, but no point was made on this at the trial, and it does not seem to us now that the plaintiff should for that be hindered from a recovery, if in vital matters he has made out a case. It is not objected that the mayor was not a proper officer to sign a lease, and, so far as that was concerned, commit the defendant or the county to the obligations of a tenant. So that we have a lease in due form, duly executed as to the manual act of signing it, and occupation taken under it, and payment of stipulated rent made for several quarters by the financial officer of the defendant.

Though the defendant or the county of New York may take on the relation of a tenant, it is not every public officer of either of them that may bind it in that wise, without authority from a source having lawful power to give it. We have seen that the board of supervisors did direct the taking of this lease. It was the duty of the plaintiff to furnish a citation to the statute that conferred power upon the board to do this. He has not given a citation to any statute that does it in express terms; nor have we, in cursory examination, been able to find one. But he has cited a statute in which the legislature treats the matter as if the power existed and had been, before the passage of that act, exerted. (See chap. 367, Laws of 1872, vol. 1, p. 908, §§ 2, 3.) In that, after legalizing the action of the board of supervisors as to the salary of the recorder, the legislature

forbids him any other compensation for official labor, but provides that such provision shall not prevent the board from providing chambers for him. It was soon after the passage of this act that the board made its resolution directing a lease to be taken for the plaintiff's premises. There are statutes, in much repetition, authorizing and directing the supervisors of the county of New York to provide for the expenses of the judicial force of the county, to see to repairs of court-house and jail, to provide courts with rooms, to fix the salaries of judicial officers, including the recorder. In Hoffman's Digest of Laws relating to the city and county of New York, volume 1, page 428, it is said that the board of supervisors is required, by various laws, to furnish offices for the use of county officers; and that the sums paid for the rent of such offices fall within this head. He does not, in any other manner, cite the laws that he speaks of. He refers to the printed volume of the proceedings of the board of supervisors for 1863 (Doc. 13, p. 48) where there is the estimate of $12,200 for such rents for the year 1864, in which is a sum of $1,000 for J. T. Hoffman, recorder. The Laws of 1864 (p. 942) empower and direct the supervisors to raise, by tax, a sum for rents. In the present state of the case, we will take this as a sufficient showing of lawful power in the board, either by direct legislative conferment, or by legislative recognition of and acquiescence in use, to procure chambers for the recorder, and flowing therefrom the power to procure them by renting premises therefor.

Then we have here a lease duly executed in form, and with authority to take it. It was for one year only, however, and the plaintiff is claiming rent according to its terms for a time near four years after its stipulated term had expired. He claims that the tenant made by the lease held over after the expiration of the term agreed upon, and that, upon familiar rules, the tenant is liable for other years of continued occupation on the terms of the lease. The occupation by the recorder was enough to bring the case within those rules, if it was an occupation that had the lawful effect of binding the original lessee. The recorder could not, by his act, if it was no more

authorized than by his own will, affect the lessee to that extent. It was not in his official power to bind the county or the city, in the first instance, to a tenancy under a lease, nor could he, by his act, without authority or acquiescence from a higher power, create a holding over that would make either liable. But he did not continue in possession for himself. He was placed in possession under the lease by the board of supervisors, whose duty and whose power it was to get for him chambers. That power and duty remained with the board; we must assume that it felt the duty and discharged it, and exerted its power by acquiescing in the continuance in possession by the recorder. It was as well to discharge that duty in that way, if the rooms were eligible and the terms of the lease reasonable, as by a renewal of the lease formally or by procuring other apartments. We must assume that in the routine of the business of the board, this subject came to the surface in its turn, and was disposed of by recognition of the continued occupation by the recorder, and by contentment therewith. And this notion has support from the action of the board of aldermen in December, 1876. That board had at that time, under the law of 1874 (*supra*), taken the place of the board of supervisors; and finding rooms unoccupied in a public building, designated them as the chambers of the recorder, thus showing that they remembered and discharged the duty devolved upon them and giving ground for the inference that it had not been forgotten before, but had been satisfied by permitting the recorder to stay in the rooms of the plaintiff. The board of supervisors had the power to procure rooms by taking a lease in the first instance, and thus the power of creating a tenancy. It had the power to do such things as are incident to the relation of a tenant and may lawfully go with or follow it. One of those is with consent of the landlord, or, in the absence of his dissent, to hold over after the expiration of the term. It is, in effect upon the tenant, another way of renewing the lease for another year. By acquiescence in the action of the recorder, the board used this power and from year to year renewed the obligation upon the lessee to perform the covenants in the lease.

We see no objection to this action of the board in any of the provisions of the charter, so far as the facts in the case disclose any thing. It does not appear that the expense of the rent of these rooms was in excess of the appropriation for such purpose. (Laws of 1873, chap. 335, § 112.) We do not think that the renting of rooms for such purpose falls within the phrase "work or supplies," for which there must be a letting by contract to the lowest bidder (id., § 91), and certificate of necessity from the head of a department. (Id., § 92; see 4 Bosw. *infra.*) Nor is it a hiring for a period longer than five years. (Id., § 18.) It is for a year at a time, and may be abandoned before another year has begun.

Our discussion shows that the case of *The Farmers' Loan & Trust Co.* v. *The Mayor* (4 Bosw. 80) is not in point; for there, was no authority to take a lease at first, nor was a lease taken. There, was a wrongful taking possession by public officers at the outstart, and a wrongful and forcible continuance, though there was a promise of compensation; but both were without authority.

The defendant takes a position, based upon the resolution of the board of aldermen of December, 1876, of which we have spoken. It is claimed that when this was adopted, the continuance in occupation by the recorder was no longer permitted by the source of power; that he was bound to obey orders, and should have left the rooms at once and that his longer stay was not a holding by the defendant. If this should be granted, it does not go to the whole case of the plaintiff. He was paid to the 1st November, 1876, only. The rental year, upon which the holding over had then entered, did not end until 1st May, 1877, leaving two quarters for which the lessee was bound. It is not needful to consider how it would be, for so much of the rest of the year 1877 as is claimed by the plaintiff. The facts may be more fully developed on another trial.

It appears from what we have said, that some of the matters involved in the case are not as clear as is to be wished for. We are satisfied, however, that the ground is not tenable on which the nonsuit was put at Circuit and upheld at General

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Term; while upon the other points the preponderance is with the plaintiff. We accordingly reverse the judgment and direct a new trial.

All concur, except MILLER, J., dissenting.

Judgment reversed.

PETER E. N. DECKER, Respondent, *v.* CHARLES BOICE et al., Appellants.

An assignee in good faith and for a valuable consideration of a recorded mortgage gets no preference over a prior unrecorded deed or mortgage by reason of such record, when his assignor could not claim it by reason of notice or any other equity.

The contrary rule declared in *Jackson* v. *Van Valkenburgh* (8 Cow. 260), held to be no longer in force.

Such assignee is, however, a purchaser, and his assignment is a conveyance under the Recording Act. (1 R. S. 756, §§ 37, 38.)

If, therefore, the assignment is recorded before the recording of such prior deed or mortgage, he thereby obtains a preference; and an unrecorded conveyance is as to him void under said act.

In an action for partition, plaintiff claimed title under a sale on foreclosure of two mortgages, both executed April 1, 1872. Two other mortgages were executed at the same time, all the mortgagees mutually agreeing that neither mortgage should have priority over either of the others, but that all should be equal liens. The mortgages under which plaintiff claimed were recorded in December, 1872; they were both assigned, the assignees taking for a valuable consideration and in good faith, and the assignments were recorded, one in January, 1874, the other in June, 1876. The other two mortgages were recorded, one in July, the other in August, 1877. *Held*, that the assignees of plaintiff's mortgages were subsequent purchasers under the Recording Act, and upon recording their assignments acquired a preference over the other mortgages, and that, therefore, plaintiffs acquired a valid title under the foreclosure sale.

Westbrook v. *Gleason* (79 N. Y. 23), *Greene* v. *Warnick* (64 id. 220), *Crane* v. *Turner* (67 id. 437), distinguished.

(Argued December 3, 1880; decided December 14, 1880.)

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APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 26, 1879, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 19 Hun, 152.)

This was an action for partition.

The facts pertinent to the questions discussed appear sufficiently in the opinion.

Alexander McDowell for appellants. The agreement between the parties and the equities attending the original transaction attached to and followed the mortgages into the hands of the assignees. (61 N. Y. 104; 64 id. 225, 226; 67 id. 437.) The purchaser under the foreclosure would get by his purchase only the same interest in the premises, upon which the mortgage was a lien the mortgagee and assignee had. (3 Sandf. 333; 2 R. S. 200; Thomas on Mortgages, 364–8; 64 N. Y. 220; 67 id. 440.) Under the Recording Act plaintiff was a purchaser, and the assignment to him was a conveyance; but he was in no sense a subsequent purchaser. (67 N. Y. 437; *Campbell* v. *Vedder*, 1 Ct. of App. Dec. 295.) The assignee of one of the mortgages did not obtain any advantage over the other mortgages, by taking and recording the assignment. (*Bush* v. *Lathrop*, 22 N. Y. 538; *Shafer* v. *Reilly*, 50 id. 61; *The Trustees of Union College* v. *Wheeler*, 61 id. 88; *Greene* v. *Warnick*, 64 id. 220; *Crane* v. *Turner*, 67 id. 437; 64 id. 225, 226; *Corning* v. *Murray*, 3 Barb. 654.) By the purchase Decker secured a good title to the interest which Crandall and Kellogg had a right to sell and no more. (2 R. S. 192; 3 Sandf. 333; Thomas on Mortgages, 364; 10 Barb. 558; 5 Hill, 272; 59 N. Y. 415.) If plaintiff was a *bona fide* purchaser, that will not help him out. (66 N. Y. 199.)

S. S. Knox for respondent. The mortgages given to Catharine Decker and William Henry Boice, and purchased by Hiram Crandall and Alvah Kellogg in good faith, for full

value, and without actual or constructive notice of the Clark or Rockfeller mortgages, are prior liens on the lands described in the complaint, by virtue of the Recording Act, as the assignments were first recorded. (*Jackson* v. *Van Valkenburg*, 8 Cow. 260; *Fort* v. *Burch*, 5 Denio, 187; *Shaffer* v. *Reilley*, 50 N. Y. 68; *Trustees, etc.*, v. *Wheeler*, 61 id. 117; *DeLancey* v. *Stearns*, 66 id. 161; *Paige* v. *Waring*, 76 id. 469.) If a junior mortgagee with notice assigns to one who has no notice, the assignee is entitled to the preference, provided, he records his assignment before the prior mortgage is recorded. (*Jackson* v. *Van Valkenburg*, 8 Cow. 260; *Fort* v. *Burch*, 5 Den. 187; *Bush* v. *Lathrop*, 22 N. Y. 540; *Shaffer* v. *Reilley*, 50 id. 68; *Trustees, etc.* v. *Wheeler*, 61 id. 117; *DeLancey* v. *Stearns*, 66 id. 161; *Paige* v. *Waring*, 76 id. 469). By the Recording Act, every conveyance of real estate recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." (1 R. S. 756, § 1; id. 762, §§ 68, 69, 70 [§§ 36, 37, 38]; *Brown* v. *Valkening*, 64 N. Y. 76–82). The plaintiff, being a purchaser from one who is protected by the Recording Act, takes a perfect title. (*Jackson* v. *Van Valkenburg*, 8 Cow. 260; *Webster* v. *Van Steenberg*, 46 Barb. 211; *Wood* v. *Chapin*, 13 N. Y. 509; *Fort* v. *Burch*, 5 Den. 187; *Bush* v. *Lathrop*, 22 N. Y. 549; *Shaffer* v. *Reilley*, 50 id. 68; *Trustees, etc.* v. *Wheeler*, 61 id. 117; *DeLancey* v. *Stearns*, 66 id. 161; 24 Penn. 363; *Hetzel* v. *Barber*, 69 N. Y. 1–9; *Paige* v. *Waring*, 76 id. 463, 469; *Westbrook* v. *Gleason*, 21 Alb. L. J. 32.)

ANDREWS, J. The plaintiff claims title to six undivided ninth parts of the premises, of which partition is sought in this action, as purchaser, on a statute foreclosure of two mortgages, dated April 1, 1872, executed by Charles Boice, one to William Henry Boice, and the other to Catherine Decker, each mortgage being on the undivided six-ninths of the premises. The mortgages were recorded December 27, 1872. The mort-

gage executed to William Henry Boice was assigned by him to one Crossett, November 6, 1873, and the assignment was recorded January 3, 1874, and was afterward assigned by Crossett to one Kellogg, whose assignment was recorded June 29, 1877. The mortgage to Catherine Decker was assigned by her to Peter E. N. Decker, June 24, 1876, and, on the same day, by him to Hiram Crandall, and both assignments were recorded on that day.

The defendants, Mary J. Clark and Sally Ann Rockefeller each claim to hold a lien on the undivided six-ninths of the premises purchased by the plaintiff, by virtue of mortgages executed to them severally by Charles Boice, of the same date as the mortgages executed by him to William Henry Boice and Catherine Decker. The mortgage to Mary J. Clark was recorded July 24, 1877, and the mortgage to Sally Ann Rockefeller, August 4, 1877. The four mortgages were given on the purchase by the mortgagor, Charles Boice, from the several mortgagees, of their interest as children and heirs-at-law of Henry Boice, deceased, in about ninety acres of land, of which he died seized, each child being entitled to an undivided ninth part thereof.

The controversy in this case turns upon the effect to be given to the recording of the assignments of the mortgages under which the plaintiff purchased. The court at Special Term found that the several assignees were purchasers in good faith, and for a valuable consideration, without notice of the mortgages held by the defendants. If the assignees, by the recording of their assignments, obtained priority over the defendants' mortgages, the plaintiff, as the purchaser on the foreclosure, is entitled to the benefit of their position, and the defendants' mortgages, being upon that assumption subordinate liens, were cut off by the sale.

The four mortgages, as has been stated, were executed at the same time. Each mortgagee had notice of the other mortgages, when his mortgage was taken, and the mortgagees mutually agreed that neither mortgage should have priority

over any other, but that all should be equal liens on the mortgaged premises. It is clear that Boice and Decker acquired no priority over the Clark and Rockefeller mortgages by having their mortgages first recorded, for two reasons: First. They had notice of the Clark and Rockefeller mortgages when they put their mortgages on record; and second, all the mortgages having been executed concurrently, Boice and Decker were not, as to the holders of the Clark and Rockefeller mortgages, subsequent purchasers, and the recording acts as between them had no application. (*Greene* v. *Warnick*, 64 N. Y. 220.) So also upon the assignment of the Boice and Decker mortgages, the assignees acquired no priority from the fact that the assigned mortgages were recorded when they took the assignments, or because they had no notice when they purchased of the existence of the Clark and Rockefeller mortgages. The general rule that the purchaser of a chose in action must abide by the title of the person from whom he buys and takes subject to the equities of the debtor, and also the latent equities of third persons, applies in general to the assignee of a mortgage. Boice and Decker held their mortgages subject to the equity growing out of the agreement between the four mortgagees, that all the mortgages should be equal liens and that neither should have priority. Their assignees were affected by this equity, although they purchased without notice, and the fact that the mortgages were recorded does not aid them, for the reason that it has been authoritatively settled that the assignee of a recorded mortgage, although an assignee in good faith and for a valuable consideration, gets no preference over an unrecorded deed or mortgage by reason of such record when the mortgagee and assignor himself could not claim it in consequence of his having had notice, or by reason of any other equity. (*Fort* v. *Burch*, 5 Den. 187; *Westbrook* v. *Gleason*, 79 N. Y. 23.) The contrary rule which was declared in *Jackson* v. *Van Valkenburgh* (8 Cow. 260), under the former statute, cannot, in view of the decisions made under the Revised Statutes, be regarded as any longer in force.

We come then to the question whether the assignees of the Boice and Decker mortgages, by recording their assignments, acquired under the Recording Act priority over the unrecorded mortgages of the defendants. An assignee of a mortgage is by the express terms of the Recording Act a purchaser, and both the mortgage and the assignment, if in writing, are conveyances. (1 Rev. Stat. 756, §§ 37, 38.) The term "conveyance" is defined by the thirty-eighth section to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned; or by which the title to any real estate may be affected in law or equity, with certain specified exceptions not material to the present inquiry. It is doubtless somewhat incongruous, in view of the doctrine now well settled in this State, that a mortgage is a mere security, and not a title, to define it as a conveyance of an estate or interest in the land mortgaged, but the character of mortgages as mere choses in action was not as well understood when the Revised Statutes were enacted as it has since been. By the common law, a mortgage was a conditional conveyance of the land mortgaged, and it still is a conveyance within the Recording Act. An assignment of a mortgage in writing is also a conveyance within the act, for the reason that it is an instrument by which the mortgagee's interest or title is transferred. This is substantially the construction given to the act by the chancellor in *Vanderkemp* v. *Shelton* (11 Paige, 28), and it has been recognized in subsequent cases.

The assignments of the Boice and Decker mortgages were recorded before the recording of the mortgages to the defendants. The assignees, therefore, were purchasers whose conveyances were first recorded, and having taken the assignments in good faith and for a valuable consideration, the unrecorded mortgages were, as to them, by the express terms of the statute, void. Under the Recording Act an assignee of a mortgage may, as against a prior unrecorded mortgage, acquire a better right than was possessed by his assignor. This principle was distinctly asserted in the recent case of *Westbrook* v. *Gleason* (79

N. Y. 23). In that case there were two successive mortgages on the same land. The mortgagor, in the first mortgage, was the mortgagee in the second. The second mortgage was first recorded and was then assigned to a *bona fide* purchaser for value before the first mortgage was recorded, but the assignment was not recorded until after the recording of the first mortgage. The mortgagee in the second mortgage could not have claimed priority, because when he recorded his mortgage he had notice of the prior mortgage which he had himself executed. It was held in a controversy between assignees of the respective mortgages, that the assignee of the second mortgage could derive no benefit from the prior record of his mortgage, as he stood as to that in the shoes of his assignor, and that he was not entitled to priority by the record of his assignment because the first mortgage was recorded before the recording of his assignment. But it was conceded, that if he had recorded his assignment before the first mortgage was recorded, he would have gained a preference. RAPALLO, J., said: "He would have been protected had he taken the precaution to place his assignment on record before the plaintiff's mortgage was recorded." The same principle was decided in *Fort* v. *Burch* (*supra*). The remark has been made in some recent cases, following *dicta* in earlier cases, that the only purpose of the statute, authorizing the recording of assignments of mortgages, was to regulate the relation to each other of successive assignees of the mortgagee of the same mortgage. (*Greene* v. *Warnick*, 64 N. Y. 226; *Crane* v. *Turner*, 67 id. 437; *Westbrook* v. *Gleason*, 79 id. 32.) But in none of them was this remark essential to the decision. In *Greene* v. *Warnick* the controversy was as to priority between two concurrent mortgages, one of which, in violation of the agreement between the two mortgagees, had been first recorded and afterward assigned to Warnick. But the other mortgage was recorded before the assignment to Warnick had been either made or recorded, and, as Warnick's conveyance, *i. e.*, his assignment, was not first recorded, he was not within the protection of the statute, and it was so decided.

Opinion of the Court, per ANDREWS, J.

In *Crane* v. *Turner* the equitable owner of land in possession under a contract of purchase executed a mortgage which the mortgagee assigned, and the mortgage and assignment were both recorded. Afterward the mortgagor received a deed of the premises and conveyed them, taking back a mortgage which he recorded, and then assigned this mortgage to an assignee who had no actual notice of the first mortgage, but who had notice that the mortgagor in that mortgage had been in possession of the premises under his contract from before the date of the mortgage. The assignee recorded his assignment, but it was held that the first mortgage had priority.

It is doubtless true that it was one object of the provision for recording assignments of mortgages, to protect a subsequent assignee of the mortgagor of the same mortgage from being defrauded through a prior assignment not before required to be recorded, and of which he might have no notice. (*James* v. *Morey*, 2 Cow. 246; *Vanderkemp* v. *Shelton*, *supra*.) But this was not the only purpose. The assignee in good faith and for value of a mortgage, by recording his assignment, may gain priority over a prior unrecorded mortgage, although it could not be claimed by his assignor.

We think the judgment is right and that it should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

MARTIN MAAS et al., Appellants, *v.* THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY et al., Respondents.

The T. and N. R. R. Co. executed a mortgage on its road to secure its bonds to defendant, the U. T. Co., as trustee for the bondholders, and bonds were prepared for issuing, each of which contained a clause that it should not become obligatory until authenticated by a certificate indorsed thereon duly signed by said trustee. Said bonds were signed by the proper officers of the company, but before the company's seal was affixed or the required certificate attached, a portion of them were stolen, a seal and certificate forged thereon, and the bonds sold; plaintiffs purchased them for a valuable consideration and in good faith. The T. and N. Co. was consolidated with defendant, the M., K. and T. R. Co.; by the agreement of consolidation the latter was to take up outstanding bonds of the former company, issuing its own in exchange. In an action to compel such an exchange for plaintiffs' bonds, *held*, that plaintiffs were bound by the condition in the bonds making the certificate of the trustee essential to their validity; that neither the payment of value nor good faith on their part created a cause of action; and that the defect in the bonds was not waived by the agreement of consolidation; also, that the failure of the obligor, after discovering that the bonds had been lost or stolen, to notify the public of that fact did not constitute negligence making it liable.

Also, *held*, that the plaintiffs were not entitled to have returned to them said forged bonds, which had been delivered for the purpose of exchange; that plaintiffs had no title to them, as they had never been issued or put in circulation by defendants, and so were the property of the T. and N. Co.

(Argued November 29, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made October 8, 1879, affirming a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought to compel the delivery by defendants to plaintiffs of nine bonds of defendant, the Missouri, Kansas and Texas Railway Company, of $1,000 each, in exchange for a like number of the bonds of the Tebo and Neosho Railroad Company.

The facts found are substantially as follows: On the 1st

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of June, 1870, the Tebo and Neosho Company executed a mortgage on its railroad to defendant, the Union Trust Company, as trustee to secure an issue of 2,000 bonds for $1,000 each; by the terms of the mortgage each of these bonds had to be properly signed and sealed by the railroad company, and also to be certified by the trust company to be one of the series secured by the mortgage before the bond became obligatory on the railroad company. Each of the bonds contained the following clause:

"This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed thereon, duly signed by the trustee aforesaid." The attestation clause of each bond was as follows:

"In witness whereof, the said Tebo and Neosho Railroad Company has caused its corporate name and seal to be hereunto affixed by its president and secretary on the first day of June, 1870."

The railroad company caused the bonds to be prepared and printed on the 13th of June, 1870, and among them were the nine bonds in question. Said nine bonds, with the others, were signed by the president and secretary of the Tebo and Neosho Company, on or before the 8th day of August, 1870, with the intent and for the purpose of being duly sealed with the seal of such company and then transmitted to the office of the trust company to be certified by said company. The corporate seal was never affixed to said nine bonds and no certificate of the trust company was indorsed thereon. They were stolen from the obligor by some unknown persons; a fabricated seal, in imitation of that upon the genuine bonds, was affixed without its order or knowledge, and the signature to the certificate of the trust company by its president was forged upon them. In that condition they were put upon the market, and in July, 1872, were purchased by the plaintiffs for a valuable consideration, and in ignorance that they were not valid bonds, from a broker claiming to own them, and who sold them as genuine bonds in all respects.

Said bonds were missed in the early part of August, 1870,

of which fact defendants were advised, but no notice was given to the public by advertisement or otherwise. In October, 1870, the Tebo and Neosho Company was consolidated with defendant, The Missouri, Kansas and Texas Railway Company, to which it transferred its franchises and property. By the consolidation agreement the latter company agreed to take up the outstanding bonds issued by the former by issuing its own bonds in exchange therefor. In July, 1872, plaintiffs left said bonds with the secretary of the M. K. and T. Co. for the purpose and with the request that they should be exchanged for its bonds in pursuance of the agreement, but said company refused to deliver its bonds therefor. Plaintiffs demanded of both defendants that such exchange should be made or that their bonds should be returned, but defendants refused to do either.

A. R. Dyett for appellants. There being no omission or defect on the face of the bonds affecting their validity and plaintiffs being *bona fide* holders for value the court erred in dismissing the complaint. (*Brainard* v. *N. Y. H. R. R. Co.*, 25 N. Y. 496; *Bank of Rome* v. *Village of Rome*, 19 id. 20; *Mercer Co.* v. *Hackett*, 1 Wall. 83; *Birdsall* v. *Russell*, 29 N. Y. 220, and cases cited by Russell, argued, 228–230, 232; *Finnegan* v. *Lee*, 18 How. Pr. 186; *Hubbard* v. *N. Y., etc., R. R. Co.*, 14 Abb. 275.) If when the bonds were signed it was intended to sign just such instruments, they are good in the hands of a *bona fide* holder for value, although stolen or otherwise fraudulently put into circulation, there being nothing on their face to excite the suspicion of ordinary men, and a purchaser of them is not required to closely or critically examine them. (*First Nat. Bk.* v. *Green*, 43 N. Y. 298; *Hyer* v. *Dorchester Bk.*, 11 Cush. 251; *Duncan* v. *Scott*, 1 Campb. 100; *Dutchess Co., etc., Ins. Co.* v. *Hatchfield*, 8 N. Y. Sup. Ct. 675; *Worcester Bk.* v. *Dorchester, etc.*, 10 Cush. 488; *Sybell* v. *Nat. Currency Bk.*, 54 N. Y. 288; *Vale* v. *Parker*, 6 Wend. 615, 620; *Putnam* v. *Sullivan*, 4 Mass. 45; *Matthews* v. *Mass. Nat. Bk.*, Am. L. Reg., March, 1875, 153; Parsons on Bills, 114; *Foster* v. *McKin-*

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non, 314, 315, 317, *supra*; *Young* v. *Grote*, 4 Bing. 253; Byles on Bills [6th ed.], 292, note *a* and note 1, and *Rex* v. *Revett*, cited at p. 103; *Murray* v. *Gardner*, 2 Wall. 10; *Ingham* v. *Primrose*, 28 L. J. C. P. 295; 7 C. B. [N. S.] 82; *Montague* v. *Perkins*, 22 L. J. C. P. 188; S. C. Jurist, vol. 17, part 1; *Van Duzer* v. *Howe*, 21 N. Y. 531; *Avoden* v. *Dixon*, 6 Exch. 869; *Magee* v. *Badger*, 34 N. Y. 247; *Scholey* v. *Ramsbottom*, 2 Campb. 485; *Bk. Com.* v. *Curry*, 2 Dana, 122; *Moody* v. *Threhild*, 13 Ga. 55; *Shipley* v. *Carroll*, 45 Ill.; *Welsh* v. *Sage*, 47 N. Y. 143, 146; *Goodman* v. *Lenard*, 25 How. [U. S.] 343; *Briggs* v. *Ewart*, 51 Miss. 245; *Aull* v. *Colket*, 2 N. Y. Weekly Dig. 30; *Helvese* v. *Hibernia Bk.*, id. 417; *Citizens' Bank* v. *Smith*, id. 147.) It is immaterial that these bonds were not sealed by actual authority of the railroad company. (37 Me. 349; 12 Mich. 138; 3 Miss. 385; 19 Johns. 60; *Barnes* v. *Ontario Bk.*, 19 N. Y. 63; *Tenny* v. *E. W. Lumber Co.*, 43 N. H. 343; 30 Vt. 152, 159.) There being a seal affixed the presumption in law is that it is the genuine seal. (*Bowen* v. *Irish*, 6 Bosw. 263.) A *bona fide* purchaser for value has a right to rely on that presumption. (*Ledwitch* v. *McKeon*, 53 N. Y. 307; Angell & Ames on Corporations [5th ed.], § 707; *McWilliams* v. *Mason*, 31 N. Y. 294.) The nine bonds in question having been shown to have been in the possession of the company to be sealed and transmitted to the Trust Company to be certified, the presumption, upon the facts found, is that they were put in circulation by the president or secretary, or some other of the officers of the company, and they were, therefore, valid bonds of the company in the hands of a *bona fide* purchaser for value. (*Mechanics' Bk.* v. *N. Y. & N. H. R. R. Co.*, 34 N. Y. 30; *Farmers, etc., Bk.* v. *Butchers and D. Bk.*, 15 id. 125; 14 id. 623; *McWilliams* v. *Mason*, 31 id. 294, cited *supra*; *Van Duser* v. *Howe*, 21 id. 531; *Shotwell* v. *Mali*, 38 Barb. 445; *Life, etc.*, v. *Mechanics' F. Ins. Co.*, 7 Wend. 31.) But if they got into circulation by the carelessness or negligence of the officers of the company the same result follows. (*Helvese* v. *Hibernia Bk.*, 2 N. Y. Weekly Dig. 417; *Aull* v. *Colket*, id. 30.) The Missouri, Kansas and

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Texas Company is estopped from disputing the validity of the mortgage to the extent of the nine bonds in question. (*Hartly* v. *Harrison*, 24 N. Y. foot of page 171 and page 172; *Halsey* v. *Reed*, 9 Paige, 446; *Russell* v. *Pistor*, 7 N. Y. 171; *Ritter* v. *Phillips*, 53 id. 586; *Cramer* v. *Sepper*, 2 N. Y. Weekly Dig. 589; *Freeman* v. *Auld*, 44 id. 53.) The trust created by the mortgage executed by the Missouri, Kansas and Texas Railway Co. to the Union Trust Company of February 1, 1871, even if regarded as a voluntary trust was irrevocable without the consent of the *cestuis que trust*. (*Drosier* v. *Brereton*, 15 Beav. 251; *Bunn* v. *Winthrop*, 1 Johns. Ch. 337; *Briggs* v. *Davis*, 21 N. Y. 576, 577; *Fellows* v. *Herman*, 4 Lans. 230, 242, 244.) Nor could the trustee refuse to execute it. (*Wood* v. *Wood*, 5 Paige, 596; *Griffin* v. *Ford*, 1 Bosw. 123; *Bleecker* v. *Brigham*, 3 Paige, 246; *Jones* v. *Butler*, 30 Barb. 614; Tiff. & Bull on Trustees, 536 *et in notis*.) The *cestuis que trust* have the right in equity to enforce the trust although the trust was created without their knowledge. (*Weston* v. *Barker*, 12 Johns. 276; *Moses* v. *Murgatroyd*, 1 Johns. Ch. 119; *Duke, etc.* v. *Coddington*, 3 id. 229; *Hosford* v. *Merwin*, 5 Barb. 51; Tiff. & Bull. on Trustees, 230, 231.) The bonds in question having been delivered to and received by the Missouri, Kansas and Texas Railway Co., for the purpose of being exchanged for its own bonds and delivered by that company to its own trustee for the same purpose, neither of those companies can dispute the validity of the bonds or the plaintiff's title thereto. (*Welch* v. *Sage*, 47 N. Y. 143; *Marvin* v. *Elwood*, 11 Paige, 365; *Vosburg* v. *Huntington*, 15 Abb. 254; *Rogers* v. *Weir*, 34 N. Y. 463.)

Wheeler H. Peckham for respondents. The bonds in question were not the bonds of the Tebo and Neosho Company until its corporate seal was affixed to them. (*Jackson* v. *Pratt*, 10 Johns. 381, 387; *Jackson* v. *Wood*, 12 id. 73; *Jackson* v. *Wendall*, id. 355; *Mann* v. *Pentz*, 2 Sandf. Ch. 271; 2 Black. Com. 306; A. & A. on Corp., §§ 216, 217, 219; *Murray* v.

Vanderbilt, 29 Barb. 149.) Even if the Tebo Company had sealed the bonds they would be void, because never issued or delivered by that company. (*Lansing* v. *Gaines*, 2 Johns. 302; *Marvin* v. *McCullum*, 20 id. 288; Edwards on Bills, 186; *The People* v. *Loomis*, 4 Den. 380, 384; *Coddington* v. *Gilbert*, 17 N. Y. 490; *Whitney* v. *Snyder*, 2 Lans. 477–8; *Foster* v. *McKinnon*, Law Rep., 4 C. P. 704; *Caulkins* v. *Whisler*, 29 Iowa, 495; *Wait* v. *Pomeroy*, 20 Mich. 425; *Bunsen* v. *Huntington*, 21 id. 415; *Grover* v. *Clark*, 21 La. Ann. 567; *Lenheim* v. *Wilmerding*, 51 Penn. St. 73; *Hall* v. *Wilson*, 16 Barb. 65; *Baxendale* v. *Bennet*, L. R., 3 Q. B. Div. 525.) The facts that defendants retained the forged bonds, and have refused to return them to the plaintiffs, present no cause of action. (*Lockwood* v. *Bull*, 1 Cow. 322; *Hill* v. *Covell*, 1 N. Y. 522; *Munger* v. *Hess*, 28 Barb. 75; *Nellis* v. *Bradley*, 1 Sandf. 560; *Wheaton* v. *Baker*, 14 Barb. 597; *Ross* v. *Terry*, 63 N. Y. 615; *Brewster* v. *Burnett*, 125 Mass. 68; *Ross* v. *Terry*, 63 N. Y. 615; *Miller* v. *Race*, 1 Smith's Lead. Cas. 736.)

DANFORTH, J. The argument of the learned counsel for the appellant was ingenious, but not sufficient to overcome the conceded facts, that upon the face of each instrument was written a declaration that "this bond shall not become obligatory until it shall have been authenticated by a certificate indorsed thereon, duly signed by the trustee aforesaid," and that those in question are not so authenticated. No argument can make the case plainer, for it cannot be denied that the Tebo and Neosho Railroad Company, when arranging the terms of a proposed contract, had an unqualified right to determine upon what condition their liability should depend, nor that a person accepting the contract with notice of that condition would be bound thereby. It is true that the bonds are apparently authenticated in the prescribed manner, but this is apparent only. The signature is a forgery. The purchaser relied upon the implied or express assurance of his vendor, that it was genuine. He took no pains to ascer-

tain the truth of this assurance; nor was he prevented from doing so by either of the defendants. Had he asked, he would have learned the truth. From the consequence of his omission to do so, the fact that he paid value, and bought in good faith, cannot relieve him. He paid value for the bonds, but not to the defendants. He did not know or suspect that they were counterfeit, and so he bonght in good faith, but nevertheless they were not genuine, and so neither the payment of value nor the innocence of his intent can help him as against the defendants. These circumstances cannot create a cause of action, when one did not in fact exist. It is claimed, however, by the learned counsel for the appellant that the negligence of the railroad company "facilitated the forgery of the certificate," and in support of that position we are referred to certain findings of the court, in substance that on or before the 8th of August, 1870, the bonds were signed by the proper officers of the railroad company, with the intent and for the purpose of being duly sealed with the seal of such company, and then transmitted to the office of the trust company to be certified; that in the early part of August they were missing, and although the defendants were informed thereof they did not notify the public they were missing, lost, or stolen, or that they had not been issued by the company. We think the trial court committed no error in refusing to find that these things constituted negligence. In what way by these acts, or this omission, was the conduct of the plaintiff influenced? It is impossible to see. It might as well be said that the organization of the company and its conduct of business in such a manner as to inspire confidence in its credit, and give its obligation value, were acts leading the plaintiff on to his injury. But none of these things are important. The plaintiff's loss is owing to his own omission of duty. The defendants had furnished an easy means by which the genuineness of the bonds could be ascertained, viz.: the existence of the certificate; and the duty of inquiry was imposed upon the purchaser. If it had been performed, the loss would not have happened. It is urged, however, by the

learned counsel for the appellant that "the certificate was not essential to the validity of the bonds as obligations of the company, but solely to render them obligatory upon the trustee in the mortgage as one of the bonds secured thereby." Such a construction is opposed to the plain language of the condition, and it cannot be adopted. The declaration is that "this bond shall not become obligatory until," etc. It could, in no event, become obligatory upon any person or corporation except the one named as obligor, and who executed it. The act of the trustee, when performed, was only to authenticate, that is "to determine as real and true;" until performed the bonds rested in "supposition;" when performed its effect was to render them obligatory, and pronounce them genuine. As it has not been performed, the bonds were not complete or perfect, and have not become the contracts of the railroad company. These considerations apply also to the proposition of the learned counsel for the appellants, that the defect above indicated has been waived by the agreement of consolidation between the Tebo and Neosho Railroad Company, and the Missouri, Kansas and Texas Railway Company, and the new mortgages issued by the latter company in furtherance of that agreement. For there is thus provided means of retiring only such bonds as had been issued by the Tebo and Neosho Railroad Company, and were then outstanding. It has no application to any bond not issued by the company, or to simulated or forged bonds, or to any bond not "obligatory" upon it. The plaintiff's bonds, therefore, are not within its terms.

The views so far expressed cover the case made by the complaint, but it is urged by the learned counsel for the appellant that they were entitled to have returned to them the Tebo and Neosho bonds, or as that was refused, to their value. It might be sufficient to say that such a claim is not within the complaint. The action is upon the contract in the agreement of consolidation above referred to, and the judgment asked is that the defendants deliver nine bonds of the Missouri, Kansas and Texas Railway Company, or the value thereof; the form of the prayer

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might not be material, but it is in pursuance of the complaint. A cause of action and demand for such exchange is alleged, but no demand for a return of the Tebo and Neosho bonds. To give the relief now suggested requires that the character of the action should be changed to one of tort. The plaintiff is not entitled to a return of the forged bonds. Upon their face they purport to be the obligation of the Tebo and Neosho Company, but are not. They were made to appear so by the commission of a crime. Before the alteration or forgery they were the property of the Tebo and Neosho Railroad Company, and it was intended they should come to the hands of the Union Trust Company. They are there now. The plaintiff has no title to them, for they were never issued or put in circulation by either of the defendants.

Without considering other questions in the case also urged against the plaintiff's right of recovery, we are of opinion that for the reasons above suggested the judgment of the Supreme Court was right, and should be affirmed with costs.

All concur.

Judgment affirmed.

LOUISA DONAI WEHLE, Appellant, *v.* WILLIAM C. CONNER, Sheriff, etc., Respondent.

Judgment debts and moneys collected on execution by and in the hands of a sheriff are liable to attachment under process issued in an action against the judgment creditor.

Wilder v. *Bailey* (3 Mass. 289) and *Pollard* v. *Ross* (5 id. 319), disapproved.

The right so to attach is not affected by the fact that the judgment debtor is also the attaching creditor.

Where property of an attachment debtor is already in the hands of the sheriff to whom the attachment is issued, no formal levy or notice is necessary to subject it to the lien of the attachment.

Where, in an action against a sheriff for a failure to return a certain execution, defendant proved, in mitigation of damages, that prior to the return day the judgments were levied upon by virtue of attachments issued to him against the judgment creditor, *held*, that the fact that the sheriff

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failed to make a valid levy by virtue of the execution did not destroy or weaken the effect of the proof in mitigation; that it was immaterial whether the failure to return was because of a neglect to levy, or arose after levy and collection; in either event, while the attachments remained in force plaintiff was only entitled to nominal damages.

Plaintiff offered to prove that there was a conspiracy between the attachment creditors, the judgment debtors and the sheriff, to issue the attachment "for the purpose of preventing the collection of plaintiff's judgment." *Held*, that the offer was properly excluded; that the fact that there was a conspiracy to do what the law authorizes did not affect the legality of the act.

It was claimed that as two of the judgments were for costs they were not affected by the attachments, because of the precedence of the attorney's lien. *Held*, that until the lien was asserted by the attorney, who alone was entitled to and could claim it, the judgments were the property of the plaintiff; and that they were to be so considered here, as there was no offer to prove that the attorney had given notice of his claim or had attempted to enforce it.

It was claimed that plaintiff was entitled to a judgment for the surplus of her judgments over the amounts claimed in the attachments. *Held*, untenable; that as the sheriff was required to keep so much of the property as would satisfy the attachment demands, with costs and expenses (Code of Procedure, § 232; Code of Civil Procedure, § 641), he had a right to exercise a reasonable discretion as to the amount so to be retained.

(Argued December 6, 1880; decided December 21, 1880.)

APPEAL from judgment of the Superior Court of the city of New York, entered upon an order made April 7, 1879, affirming a judgment in favor of defendant for costs, entered upon a verdict rendered by direction of the court, giving the plaintiff nominal damages.

This action was brought against defendant, as sheriff of the city and county of New York, for alleged neglect to return within the time prescribed three executions in favor of plaintiff, against Henry L. Butler.

Defendant proved that before the time for returning the executions, three attachments in actions against plaintiff — one issued in an action brought by the judgment debtors against her — were placed in his hands, and he, by virtue thereof, attached the judgment debts, and served notice thereof upon the judgment debtors. The actions in which the attachments were issued, it appeared, were still pending and undetermined.

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The further material facts are sufficiently set forth in the opinion.

Charles Wehle for appellant. The sheriff made no valid levy under the three executions. (*Baker* v. *Binninger*, 14 N. Y. 270; 69 id. 546; 8 J. & S. 24; *Riggs* v. *Purcell*, 74 N. Y. 370.) If moneys had been paid or realized under the executions in the sheriff's hands, they were liable to be held under the attachments which were a lien upon the judgments in favor of the plaintiff. (*Wilder* v. *Bailey*, 3 Mass. 289; *Farmers' Bk.* v. *Beatson*, 7 Gill & Johns. 421; *Jones* v. *Jones*, 1 Bland. 443; *Overton* v. *Hill*, 1 Murphy, 49; *Blair* v. *Cantey*, 2 Speers, 34; *Burrell* v. *Letson*, id. 378; 1 Strobhart, 239; *Zurcher* v. *Magee*, 2 Ala. 253; *Pawley* v. *Gains*, 1 Tenn. 208; *Drane* v. *McGavock*, 7 Humph. 132; *Lightener* v. *Steinagel*, 33 Ill. 510; *Marvin* v. *Hawley*, 9 Miss. 382; *Clyner* v. *Willis*, 3 Cal. 363; *Staples* v. *Staples*, 4 Me. 532; *Hill* v. *La Crosse & M. R. R. Co.*, 14 Wis. 291; *Dunlop* v. *Patterson F. Ins. Co.*, 74 N. Y. 145; Drake on Attachments, § 494; *Coppell* v. *Smith*, 4 T. R. 313.) The lien of the attorney for the costs was anterior to any lien obtainable by the attachments, and as to the two judgments the sheriff had no defense whatever, they not being affected by the attachments. (Weeks on Attorneys, §§ 368, 369, 384; *Crotty* v. *Mackenzie*, 25 How. Pr. 54; *Marshall* v. *Weeks*, 51 N. Y. 140; *Pulver* v. *Harris*, 52 id. 73; *Lesher* v. *Resner*, 3 Hun, 217; *Ackerman* v. *Ackerman*, 14 Abb. Pr. 229; *McGregor* v. *Comstock*, 28 N. Y. 237.) Under the circumstances the attaching creditors acquired no rights as the whole of their proceeding was a mere sham and a cover for their attempted fraud. (*Cotes* v. *Roberts*, 4 Rawle, 100.) Judgment debts are not subject of attachment. (*Franklin* v. *Ward*, 3 Mason, 136; *Shinn* v. *Zimmerman*, 3 Zabriskie, 150; Com. Dig., Attachment, D.; *Ross* v. *Clark*, 1 Dall. 354; *Sir John Parrot's Case*, Cro. Eliz. 63; *Kery* v. *Bower*, id. 186; *Coppel* v. *Smith*, 4 T. R. 312; *Grant* v. *Harding*, id. , note; 2 Bac. Abr. 260, "Customs of London," H. 1; *Franklin* v. *Ward*, 3 Mason, 136; *Sharp* v. *Clark*, 2 Mass.

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91; *Howell* v. *Freeman*, 3 id. 121; *Prescott* v. *Parker*, 4 id. 170; *Trowbridge* v. *Means*, 5 Ark. 135; *Tunstall* v. *Means*, id. 700; *Norton* v. *Winter*, 1 Or. 47.)

Almon Goodwin for respondent. The verdict was rightly directed. (*Wehle* v. *Conner*, 69 N. Y. 546.) Without notice from the attorney no lien attaches for his costs. (*Martin* v. *Hawks*, 15 Johns. 406.) The judgment-roll does not act as such notice. (*Ackerman* v. *Ackerman*, 14 Abb. 229, 234; *Ward* v. *Wadsworth*, 1 E. D. Smith, 548.) The sheriff is not called upon to look behind his process and examine judgment-rolls. (Crocker on Sheriffs, § 283.) Plaintiff could only be allowed to prove a conspiracy upon a distinct averment of that fact. (*Gaspar* v. *Adams*, 28 Barb. 441; *Kilsey* v. *Western*, 2 N. Y. 500; *Atwood* v. *Lynch*, 37 N. Y. Super. Ct. 5, 11; *Connaught* v. *Nichols*, 42 N. Y. 83.) The law does not forbid men to conspire together to do lawful acts, such as issuing attachments to collect their debts; it is only the conspiring to do unlawful acts that is forbidden. (2 Addison on Torts [Dudley & Bangs' ed.], 739, 740; *Place* v. *Munster*, 65 N. Y. 89, 95; *McIntyre* v. *Manlius*, 16 Johns. 500; *Castrique* v. *Behrens*, 30 L. J. Q. B. 163.) The plaintiff has no cause of complaint against the sheriff, because of any indemnity he may have taken to protect himself; and the fact that he has taken an indemnity will not deprive him of the protection of his process. (*Horton* v. *Hendershott*, 1 Hill, 118.) Independently of the general power of the sheriff to attach judgment debts, plaintiff is estopped by her own acts and by the adjudication of a court having jurisdiction of all the parties, from claiming that these particular attachments are not binding upon her and the judgments which she has recovered. (*Butler* v. *Wehle*, 4 Hun, 54; *Dutchess of Kingston's Case*, 2 Smith's Lead. Cas. 424, and notes thereto; *Craig* v. *Ward*, 36 Barb. 377; *S. C.*, 1 Abb. App. Cas. 454; *Chaveley* v. *Lord Dunsang*, 2 Sch. and Lef. 690, 710, 718; *Tuska* v. *O'Brien*, *Sheriff*, 68 N. Y. 446; *Freer* v. *Stotenbur*, 34 How. Pr. 440; *Glackin* v. *Zeller*, 52 Barb. 147; *Swain* v. *Seaman*, 9 Wall.

254, 274; *Rahway* v. *Graham*, 4 Abb. Pr. 468; *Mays* v. *Fretton*, 20 Wall. 418; *Young* v. *Bushnell*, 8 Bosw. 1; *Brown* v. *Bowen*, 30 N. Y. 519; *Manufacturers & Traders' Bk.* v. *Hazard*, 30 N. Y. 226.)

FINCH, J. This case is before us for the third time. On the first appeal we held that the attachments levied upon the plaintiff's judgments were not a defense to the action commenced against the sheriff for not returning the execution within the sixty days. (63 N. Y. 258.) On the second appeal we further decided that the attachments might be given in evidence in mitigation of damages, and while they remained as existing and valid process, the plaintiff could only recover nominal damages. (69 N. Y. 546.) The case has been tried and decided in accordance with that conclusion, and the judgment must be affirmed unless the facts have been materially changed, or some erroneous ruling upon the admission or rejection of evidence has occurred. We have only to consider the case in these respects.

The first ground of difference suggested is that it now appears that the sheriff did not make a valid levy under the execution, whereas our last decision was founded upon proof that he made such levy. There are several answers to this suggestion. The sheriff claims to have made a levy. The facts appear to be that he entered the store of the defendants in the execution, announced to them that he levied upon the stock of goods there present, indorsed a memorandum of the levy upon his execution, and left the goods in charge of Butler, one of the defendants. There was enough in this to make the sheriff liable as a trespasser, if not protected by his process, and quite enough to make him responsible to the parties interested for the value of his levy. (*Connah* v. *Hale*, 23 Wend. 462; *Camp* v. *Chamberlain*, 5 Den. 198; *Barker* v. *Binninger*, 14 N. Y. 270.) It appears further that his action was, at least, sufficient to induce the debtors in the execution to deposit for the sheriff's indemnity an amount of money sufficient for his protection, so that practically he holds the money instead of

the goods. This statement of the facts deprives of all its force the argument founded on the want of a levy, that if he had done his duty the plaintiff would have had something substantial wherewith to pay or discharge the attachments. The necessary amount is provided; it is within the reach of the sheriff, and it came as the result of his levy. But were it otherwise it would not affect the ground of our previous decision or warrant a contrary conclusion. What we then held was that while the attachments remained in force and operative upon the plaintiff's judgment, they were insuperable barriers to her right to receive any thing. She suffers no damages so long as she has no right to receive the fruits of the judgment. It is wholly immaterial whether the sheriff is liable by reason of not having returned the execution, because of a neglect to levy, or on account of the actual collection and receipt of the money. In either event it is only the party entitled to receive the fund who has suffered the actual damage. The sheriff is indeed liable to somebody on one or more of the grounds stated; but that person is not as yet the plaintiff. The reason why the sheriff does not pay is immaterial so long as she is not entitled to receive the pay. She is not harmed by the withholding from any cause of an amount which she has no right to receive. Any other rule would nullify the force and effect of the attachments, and enable her, without vacating process apparently valid, to circumvent it. Our ruling, therefore, went not at all upon the particular form or occasion of the sheriff's liability, but without reference to that and altogether upon the ground that only nominal damages could be claimed by one not entitled as yet to receive any thing from the sheriff.

It is next said to have been proven that upon this same levy $100 had been paid to the sheriff by the attorneys of the judgment debtors which were not levied on under the attachment. This argument admits the levy by the sheriff under his execution, but denies, as to the amount in question, the levy by virtue of the attachments. It does not appear whether this sum was paid before or after they were issued; but that is not material.

If after, the levy upon the judgment held it. If before, and if it be regarded as the property of the plaintiff, disregarding the sheriff's claim that he received it for his fees, still it was held by the attachment issued to the sheriff commanding him to "attach and safely keep the property of the plaintiff." No formal levy or notice was needed where the property was already in his hands. The attachment fastened it there, and left the plaintiff with no right to receive it. In the end it is of course to be accounted for to the person or persons properly entitled, but that result cannot be reached until the attachment suits are terminated. We do not forget the point elaborately and ably argued that the money actually collected and in the sheriff's hands could not be attached. The cases in Massachusetts (*Wilder* v. *Bailey*, 3 Mass. 289; *Pollard* v. *Ross*, 5 id. 319) are ably argued and have been approved in many of the States. But the rule has not been adopted in this State; was questioned in *Dunlop* v. *Patterson Fire Ins. Co.* (74 N. Y. 145), and the right to attach a fund in the custody of an officer of the court sustained; and if adopted by us would graft upon the enactment of the legislature an exception which that body has not seen fit to make. (Code, § 231.) Indeed the line of argument adopted in the cases referred to is better adapted to affect the judgment of those who make the laws than that of those whose duty ends with their interpretation. The same considerations equally affect the further contention that judgment debts are not liable to attachment. The counsel concedes that they are fairly embraced within the language of the Code (§ 235), but invokes an interpretation founded upon public policy. It would be a precedent dangerous and unjustifiable if we should assume the right to warp a plain and unambiguous statute to suit our notions of public policy.

A question is raised as to two of the judgments which were rendered for costs on appeals. It is insisted that they were not affected by the attachments, because of the precedence of the attorney's lien. But that question is not here. Until such a lien is asserted by the party entitled to it the judgments are the property of the plaintiff. The sheriff could not treat them

otherwise, nor can the court. Without notice of the claim the lien cannot be enforced. (*Martin* v. *Hawks*, 15 Johns. 406; *Ackerman* v. *Ackerman*, 14 Abb. 234; Crocker on Sheriffs, § 283.) There was no offer to prove such notice, nor any attempt to enforce the lien by the party entitled. The attorney only could do it, for with him alone was the right.

The plaintiff offered to prove that "there was a conspiracy between the three attachment creditors and the judgment debtors and the sheriff, by which these attachments should be issued for the purpose of preventing the collection of plaintiff's judgments." The offer was excluded, and we think properly. The learned counsel for the plaintiff argues in support of his offer as if it was an effort to prove the attachments fraudulent and void. No such suggestion was made. The proposition was simply to show a conspiracy to accomplish a perfectly lawful purpose. The attachments *were* issued for the purpose of preventing the collection by plaintiff of her judgments. There can be no dispute about that. It needed no further evidence to settle that question. Such is the very object of the attachment and the precise purpose of the law in permitting it to issue. The sole point of the offer is that the parties conspired to do what the law authorizes. The act is neither better nor worse for the conspiracy. It is said it was a scheme to "nullify a valid process of the court;" but if so it was done by another "valid process of the court;" an event not at all of uncommon occurrence. The authorities cited on behalf of the respondent, though scarcely needed, fully sustain this view of the question. (*McIntyre* v. *Mancius*, 16 Johns. 600; *Place* v. *Minster*, 65 N. Y. 95; 2 Addison on Torts, 740.)

That the judgment debtor was also one of the attaching creditors is a fact pressed upon our attention. It is a fact in the case. The question asked is whether it is allowable. We are unable to see why it is not. The law which permits the issue of such attachment awards it to all creditors who bring themselves within its provisions. By what right can we assume to draw distinctions and withhold the privilege given to all from particular classes or persons? The plaintiff is bent

upon procuring from Butler and his partners a debt which they owe her. They are equally bent upon compelling her to pay a debt which they insist she owes them. Shall we lend to her the power of the law, and withhold it from them? The learned counsel argues that mischief will result because debtors will procure attachments to be levied upon the debts which they owe and are in process of collection. But an attachment in such a case implies a debt due from the plaintiff in the judgment attached which can serve as the basis of its issue. If such a debt is due the remedy works no wrong. If it is not due, the plaintiff has ample opportunity to resist it in the courts.

It is finally said that the surplus of the three judgments over and above the amounts claimed in the attachments should have been awarded to the plaintiff. We may suppose, but cannot know, that there will be such surplus. How long the attachment suits will continue before a final determination; how much of interest and costs will accumulate upon the debt, it is impossible to foresee. It is a sufficient answer, however, to say that by the attachments the sheriff is required to safely keep so much of the property as will satisfy the attachment demands with costs and expenses. (Code, § 232; new Code, § 641.) He has the right to a reasonable judgment as to the amount to be so held. He is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty. The plaintiff has no authority to dictate the extent of the levy, any more than the defendant has to limit it. (*Fitzgerald* v. *Blake*, 42 Barb. 513.) There is, therefore, no ground upon which the claim can be rested of a right to recover in this action a supposed or probable surplus.

It does not occur to us that any serious questions raised on the argument remain to be considered. We are unable to see that the case is materially changed from its situation at the time of our former decision.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

THE PEOPLE ex rel. JOHN COMAFORD, Respondent, v. JAMES E. DUTCHER, Sheriff, etc., Appellant.

The provision of the State Constitution (art. 6, § 26), declaring that "courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law" is not limited to offenses of the grade specified, created by statute after the adoption of that provision; it includes as well all such offenses existing by statute at that time, including petit larceny.

The said provision also was intended to confer authority upon said courts as they were then or might thereafter be constituted by statute and without regard to the question whether or not they were authorized to summon and impannel a common-law jury.

The provision, therefore, of the act of 1879 (chap. 390, Laws of 1879), giving to courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offense," is constitutional and valid, and said courts can alone now try the offenses specified.

The Supreme Court has no power to let to bail one charged with such an offense.

The People ex rel. Comaford v. *Dutcher* (20 Hun, 241), reversed.

(Submitted December 7, 1880; decided December 21, 1880.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made February 10, 1880, affirming an order of Special Term, admitting the relator to bail. (Reported below, 20 Hun, 241.)

The relator was in the custody of defendant, the sheriff of the county of Dutchess, by virtue of a commitment from the recorder of the city of Poughkeepsie, upon a charge of petit larceny not charged as a second offense. The relator offered to give bail but the recorder refused to accept it and held him for trial on said charge. The relator thereupon procured a writ of *habeas corpus* and was brought before a justice of the Supreme Court, when he offered to give bail to appear at the next court having cognizance of the offense. The said justice ordered that he be allowed to enter into a recognizance in a sum specified, and he having so done and the surety having been approved, ordered his discharge from custody.

Opinion of the Court, per MILLER, J.

William R. Woodin for appellant. Chapter 390, Laws of 1879, conferring on courts of Special Sessions exclusive jurisdiction in the first instance to hear and determine certain crimes and offenses therein mentioned, is constitutional and valid. (*People* v. *Ransom*, 61 Barb. 619; *Devine, plaintiff in error*, v. *People*, 20 Hun, 98; *People ex rel. Comerford*, id. 241; N. Y. State Constitution, art. 1, § 6; id., art. 6, § 26.) In the case of a subsequent statute, if the latter was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the former one. (*Dexter & Limerick Plank Road* v. *Allen*, 16 Barb. 15.) A special act, passed subsequently to the Revised Statutes, is, so far as it conflicts therewith, virtually a repeal *pro tanto*. (*Ward* v. *Wellington*, 30 N. Y. 218.) A subsequent statute, inconsistent with a former one, repeals it by implication. (*Hartman* v. *New York*, 51 How. Pr. 351; *People* v. *Brooklyn*, 69 N. Y. 605; *Excelsior Petroleum Co.* v. *Embury*, 67 Barb. 261.)

Abram J. Rose for respondent. The jury meant by section 2 of article 1 of the Constitution, is a common-law jury of twelve men. (*Hill* v. *People*, 20 N. Y. 369; *Wynehamer* v. *People*, 13 id. 378, 456, 457.) Chapter 390, Laws of 1879, is in conflict with section 2 of article 1 of the Constitution. (*People* v. *Devine*, 27 N. Y. Sup. Ct. 98; *People* v. *Toynbee*, 20 Barb. 210.) Any law which takes from a person accused of a crime (which in 1848 was triable by a common-law jury) the right of election to be tried by such jury is unconstitutional and void. (*People* v. *Johnson*, 2 Parker, 322; *People* v. *Kennedy*, id. 312; *People* v. *Carroll*, 3 id. 22; *Wynehamer* v. *People*, 13 N. Y. 378.)

MILLER, J. The relator, after an examination before the magistrate upon the charge of petit larceny and his decision that the offense had been committed by the relator, offered to give bail for his appearance at the next court having cognizance of the offense. This having been refused, and the relator having been held for trial by the officer for the offense

charged, he sued out a writ of *habeas corpus* before a justice of the Supreme Court, and after a hearing the justice decided that the relator be allowed to enter into a recognizance, and having done so discharged him from custody.

Upon these facts the question arises, whether the officer who issued the warrant had jurisdiction to try the accused. Such right is claimed by virtue of chapter 390 of the Laws of 1879, which provides that "courts of Special Sessions, except in the city of Albany and in the city and county of New York, shall, in addition to the powers possessed by them, have also exclusive jurisdiction in the first instance to hear and determine the following cases: 1. Charges for petit larceny not charged as a second offense." This enactment, on its face, is sufficiently broad to authorize any court of Special Sessions to try an offender for the crime charged against the relator, and unless there is some difficulty in the way, the right is clear and beyond any question.

It is claimed that the act cited is in conflict with section 2, article 1 of the Constitution, which declares that "the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever." The trial by jury referred to evidently means a trial by a common-law jury of twelve men, within the principle laid down by the decisions of the courts of this State in *Hill* v. *The People* (20 N. Y. 363), and *Wynehamer* v. *The People* (13 id. 378). Such was no doubt the law prior to the amendment of section 26 of article 6 of the Constitution, which declares that "Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanor as may be provided by law." Prior to this amendment the statute cited, so far as it confers exclusive jurisdiction, would be a violation of section 2 of article 1 of the Constitution, and the amendment of section 26 of article 6 was no doubt designed to invest the legislature with authority to confer upon courts of Special Sessions full and exclusive jurisdiction in this class of cases which it was held not to possess under the decisions of the courts; and it must be regarded as a modification and a restriction of the limitation of power

which was held to exist by virtue of section 2 of article 1, in respect to offenses of the character specified. The act of 1879 was passed in conformity with the amendment referred to, and petit larceny is an offense of the same grade as a misdemeanor within its terms and embraced within its spirit and meaning.

The counsel for the relator insists that the provision of the Constitution (§ 26, *supra*) must be construed to mean only such offenses as are created by statute after the adoption of the amendment. There is, we think, no ground for thus restricting its interpretation, and it is broad and comprehensive enough to include all misdemeanors existing by statute at the time of its adoption, as well as such as might afterward be created by law. It clearly comprehends all misdemeanors for which provision is made by law, including petit larceny, and the act of 1879 confers exclusive jurisdiction to try that class of offenses. The views we have expressed are supported by the decision of the Supreme Court in *The People* v. *Rawson* (61 Barb. 619). In that case the question now considered was presented under an act of the legislature giving courts of Special Sessions in the county of Monroe exclusive power to hear, try and determine cases of petit larceny; and it was held that petit larceny was within the meaning of section 26 of article 6 of the Constitution, and the act of the legislature was valid. The subject is discussed in an able opinion by JOHNSON, J., and but little if any thing can be added to the views expressed, which contain a sound exposition of the law.

In *Devine* v. *The People* (20 Hun, 98), the same question is considered and the same result reached by a majority of the court, although in that case the conviction was reversed upon another ground. In a dissenting opinion of one of the judges, it is held that where the Constitution permits jurisdiction of misdemeanors to be given to courts of Sessions, it must be construed so as not to take away the right of the accused in such courts to be tried by a common-law jury in cases where such trial was used at the adoption of the Constitution. We think the amendment cited, and the provision as to the right

to a jury trial are entirely harmonious, and when the Constitution conferred authority upon courts of Special Sessions to try misdemeanors, it meant the courts in question, as they were and might be constituted by the legislature, whether they authorized a jury of six or otherwise. The provision of the Constitution as to a jury trial can have full scope and force by applying it to cases where trials are had in a court of record, while the amendment can apply to cases of a lower grade where the offense is not a felony. Both provisions are thus made entirely harmonious, and if it was intended that the courts of Special Sessions to which jurisdiction was given should be such as had authority to summon and impanel a common-law jury, it is but reasonable to suppose that such a provision would have been inserted in the amendment. The evident purpose of the act was to relieve the higher courts from the burden of trying trivial offenses, and to leave this class of cases to local magistrates in the vicinity where the offense was committed. Prior to its adoption the accused party had a right to be tried before the officer holding the Special Sessions, and to a jury, if he desired, or to give bail for his appearance, according to the provisions of 2 R. S. 702, § 27, at the next sitting of a competent court in the county where the case might be presented to a grand jury, and an indictment found if authorized by the testimony upon which the accused might be tried before a jury in accordance with the Constitution. This is done away with by the amendment and the act of 1879, and the Special Sessions alone can now proceed and try the offender as already indicated. Besides what has been remarked as to the effect of the amendment, it should not be overlooked that it was held in the case of *The People ex rel. Murray* v. *Justices* (74 N. Y. 406), that the constitutional provision giving a party a right of trial by jury does not apply to the petty offenses triable before a court of Special Sessions. It is thus settled by authority that the right to a common-law jury does not exist in any such case. The power to let to bail in such a case would be inconsistent with the purpose of the amendment and the act cited, and cannot be upheld.

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The order of the General Term must be reversed, and the proceedings remitted to the recorder with directions to proceed and try the prisoner.

All concur.

Order reversed, and ordered accordingly.

GUSTAV E. SPARMAN, an Infant, by Guardian, etc., Appellant, *v.* JOHN KEIM, Respondent.

The fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as one *ex delicto*.

Plaintiff's complaint alleged in substance that he is an infant; that induced by false and exaggerated representations of the defendant as to the profitable nature of his business, to wit, "that it would yield large profits," he was induced to become a partner, and invested $1,000 therein; that becoming satisfied of the falsity of the representations, he demanded his money back, which was refused, and he asked judgment for the amount. The only representation proved on the trial was "that it was a good paying business." The plaintiff was nonsuited on trial, on the ground that the cause of action stated in the complaint was in tort. *Held*, error; that the allegations of the complaint made a good cause of action on contract, as the agreement of partnership was one an infant could avoid, and having done so, plaintiff was entitled to recover back his money, less what he had received from the partnership.

(Argued December 7, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, in favor of defendant, entered upon an order made August 1, 1878, overruling plaintiff's exceptions, and directing judgment on an order dismissing plaintiff's complaint on trial.

The body of the complaint in this action is as follows:

"I. That the plaintiff is an infant under the age of twenty-one years.

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"II. That on the 5th day of October, A. D. 1874, at said city of New York, upon application duly made on his behalf, the said Chas. J. Nehrbas was, by an order of this court, duly appointed the guardian of the plaintiff for the purposes of this action.

"III. That on or about the 1st day of July, A. D. 1874, the said defendant, by means of false representations, obtained from said plaintiff the sum of $1,000, to be invested in a certain artistic decorating business which said defendant falsely represented would yield large profits, but on the contrary said business is and has been ever since said 1st day of July, A. D. 1874, constantly losing money, and furthermore said defendant is appropriating whatever profits may be and are realized, to his own use and benefit, to the great damage and injury of the plaintiff.

"IV. That relying upon such representations on the part of the defendant, the plaintiff did on or about said 1st day of July, 1874, pay over to said defendant, at his instance and request, said sum of $1,000 for the purposes of said business.

"V. Plaintiff also shows that between about June 11, 1874, and about July 1, 1874, said plaintiff, at the request of the defendant, lent and advanced unto such defendant, and also to and for his use by payments to other parties at his instance, divers sums of money, viz., altogether about $401.95, upon condition that the same should be repaid upon demand, but the defendant has wholly failed to repay the same though payment thereof has been duly demanded; and that said amount of money, so lent and advanced and paid out, as aforesaid, was thereafter, upon the formation of such partnership, allowed by the defendant as part of such $1,000 contributed as herein above mentioned, and constitutes a portion of the same.

"VI. That the plaintiff, upon ascertaining the falsity of the representations made by defendant as aforesaid, and before the commencement of this action, has demanded a return to him, plaintiff, of the aforesaid $1,000 by the defendant, who, however, utterly refused so to do, and still so refuses.

"Wherefore the plaintiff asks judgment against said defend-

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ant, for the sum of $1,000, with interest thereon from the 1st day of July, A. D. 1874, besides the costs of this action."

On the trial, plaintiff proved the allegations of the complaint as to infancy, the loan of money, the formation of the partnership and his investment therein of the sum claimed, and the demand for the return of the same and refusal. The only representation of defendant inducing the arrangement proved was that the business was a good paying business. It appeared also that plaintiff received from the business $112.69, which he offered to deduct from the sum advanced by him.

At the close of plaintiff's evidence defendant's counsel moved for a dismissal of the complaint on the ground that the representations complained of, admitting them to be false, were simply expressions of opinion, and so not false representations in the legal acceptation of the term. The motion was granted, to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard in the first instance at General Term.

William F. Pitshke for appellant. The complaint is on contract and not *ex delicto*. (*Read* v. *Lambert*, 10 Abb. [N. S.] 428, 438; *Mann* v. *Morewood*, 5 Sandf. 557; *Keteltas* v. *Myers*, 19 N. Y. 231, 233; *Byxbie* v. *Wood*, 24 id. 607, 612; *Veeder* v. *Cooley*, 2 Hun, 74.) An adult cannot draw in an infant to experiment on such infant's money in changing and enlarging the adult's business without liability. (*Kline* v. *L'Amoureux*, 2 Paige, 419; *Millard* v. *Hewlett*, 19 Wend. 301; *Chapin* v. *Shafer*, 49 N. Y 407; *Badger* v. *Phinney*, 15 Mass. 359; *Whitmarsh* v. *Hall*, 3 Denio, 375; *Stafford* v. *Roof*, 9 Cow. 626; *Bool* v. *Mix*, 17 Wend. 119; *State* v. *Plaisted*, 43 N H. 413.) The right of rescission is absolute and unconditional. Restoration of adult to his former position is not a prerequisite. (*Green* v. *Green*, 4 N. Y. Weekly Dig. 570 [decided May 22, 1877]; 69 N. Y. 556; *Heath* v *Stevens*, 48 N. H. 252.) An infant may be a co-partner (though not liable for losses) and be entitled to the benefits resulting from the partnership. But such contract is voidable by him at pleasure. (*Goode* v. *Harrison*, 5 Barn. &

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Ald. 158, 159; Simpson's "Law of Infants," 44, 45; *Corpe* v. *Overton*, 10 Bing. 252; *Everett* v. *Wilkins*, 29 L. Times Rep. [N. S.] 846; *Van Winkle* v. *Ketcham*, 3 Caines, 323, *Housten* v *Cooper*, 3 N. J. Law Rep. [2 Penn.] 431.) A cause of action is not necessarily *ex delicto* because of the averment of "false representations." (*Ross* v. *Terry*, 63 N. Y. 614; *Freer* v. *Denton*, 61 id. 492, 495; *Harway* v. *Mayor*, 1 Hun, 629, 630, 631, *Byxbie* v. *Wood*, 24 N. Y. 607, 612.) The question of fraud became immaterial on proof of infancy, which gives plaintiff a right of recovery (*Corpe* v. *Overton*, 10 Bing. 252; *Everett* v. *Wilkins*, 29 Law Times [N. S.], 846; *N. Y. Ice Co.* v. *N. W. Ins. Co.*, 23 N. Y. 359; *Poor* v. *Guilford*, 10 id. 276.) Although a complaint contains assertions of fraud the action may be still *ex contractu*. (*Graves* v. *Waite*, 59 N. Y. 156; *Greentree* v. *Rosenstock*, 61 id. 583, 589; *Vilmar* v. *Schall*, id. 564.) For a mistaken belief as to the profitableness of the transaction, an infant may rescind to get back his money from defendant if the belief was kindled by defendant. (*Smith* v. *Macklin*, 4 Lans. 41, 44, 45; *Taylor* v *Scoville*, 3 Hun, 301, 303; *Buel* v. *Boughton*, 2 Denio, 91; Ewell's Lead. Cas. on Infancy, 126.)

Leonard E. Curtis for respondent. The gravamen of the cause of action averred in the complaint is false representations, and as no false representations have been proved, even if the evidence should disclose a good cause of action, the complaint must be dismissed because its essential allegations have not been proven. (*Gasper* v. *Adams*, 28 Barb. 441; *Kelsey* v. *Western*, 2 N. Y. 506.) The statement made by the defendant that the business would pay largely was a mere expression of opinion and was not a false representation. (2 Pars. on Cont. [5th ed.] 778; *Collins* v. *Evans*, D. & M. 669; *Young* v. *Covell*, 8 Johns. 20; *Tryon* v. *Whitmarsh*, 1 Metc. 9.) The infancy of the plaintiff does not help him because an infant cannot recover money advanced on a voidable contract, unless it was obtained from him by fraud. (1 Parsons on Contracts [5th ed.], 322; *Aldrich* v. *Abrahams*, 3 N. Y. Leg. Obs.

128.) This was an executed contract, and even if it be conceded that the money was paid to the defendant, plaintiff cannot recover it without restoring the consideration. (*Bartholomew* v. *Finnemore*, 17 Barb. 428; *Gay* v. *Livingston*, 2 Bosw. 257; 2 Kent's Com. 240; *Ex parte Laylor*, 8 DeG., M. & G. 254; *Corpe* v. *Overton*, 10 Bing. 253; *Holmes* v. *Blogg*, 8 Taunt. 508.)

FINCH, J. The plaintiff was nonsuited upon the ground that the cause of action stated in his complaint was for a tort and rested upon allegations that his money was obtained from him by the false and fraudulent representations of the defendant. If that is the true and only proper construction of the complaint the nonsuit was right, for no false representations as to facts were either alleged or proved. Those alleged were only that the artistic decorating business, into which the plaintiff was invited to put his capital, "would yield large profits," and the only representation proved was "that it was a good paying business." The representations were promissory and matter of opinion, and had respect to the developments of the future. There was nothing in them on which to found an action *ex delicto*.

But we do not think that is a just or proper construction of the complaint. It alleges no facts to sustain an action for a tort, but does allege facts sufficient to sustain an action on contract. Its allegations are these: that the plaintiff is an infant; that he loaned and advanced to the defendant various sums of money, amounting to $401.95; that thereafter defendant, by false and exaggerated representations of the profitable nature of his busin ss, induced the plaintiff to become his partner; that plaintiff was thereby induced to agree to put $1,000 as capital into the business; that he did so by allowing the previous loan to be applied on his share of capital, and paying the balance in cash; that, becoming satisfied of the falsity of the representations, he demanded his money back, which was refused; wherefore he demands judgment for $1,000. These allegations make a good cause of action

on contract. The pleader may not have so intended, and he is certainly wrong in insisting that the mere numbered paragraphs of his complaint were so many separate counts or causes of action. But there is one and only one cause of action stated in the complaint. It fails to furnish ground for a recovery in tort, but does furnish facts to sustain an action on contract.

Almost all of the contracts of an infant are voidable and liable to be rescinded. This contract was of that character. (*Millard* v. *Hewlett*, 19 Wend. 301; *Chapin* v. *Shafer*, 49 N. Y. 407; *Bool* v. *Mix*, 17 Wend. 119; *Stafford* v. *Roof*, 9 Cow. 626; *Goode* v. *Harrison*, 5 Barn. & Ald. 159; *Corpe* v. *Overton*, 10 Bing. 252; *Green* v. *Green*, 69 N. Y. 553.) The infant avoided it as he had a right to do. The proof shows that he had received no benefit from it except the sum of $112.69, which, on the trial, he said had been paid him out of the business, and which he offered to restore by deducting it from his claim, and asking judgment only for the balance with interest. He, therefore, both alleged and proved a good cause of action on contract. That there were allegations of fraudulent representations in the complaint does not of necessity fix the character of the action. Thus, it was held in *Veeder* v. *Cooley* (2 Hun, 74) that where the complaint was sufficiently sustained by the testimony, it was not enough to authorize a nonsuit if a cause of action was otherwise set forth, that it contained an allegation suited to an action *ex delicto*. And in *Byxbie* v. *Wood* (24 N. Y. 607), it was decided that a complaint under the Code, stating false representations of defendant by which the plaintiff was induced to pay him money, does not necessarily stamp the action as one in tort. To the same purport are other authorities. (*Neftel* v. *Lightstone*, 77 N. Y. 96; *Ross* v. *Terry*, 63 id. 614; *Freer* v. *Denton*, 61 id. 492; *Graves* v. *Waite*, 59 id. 156.) It follows, therefore, that the nonsuit was erroneous and the plaintiff's exception thereto well founded.

The judgment should be reversed; new trial granted; costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

JAMES B. HAYNES, Respondent, *v.* JAMES H. RUDD, Appellant.

Where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid.

As to whether one who aids in doing a criminal act can, under any circumstances, have an action to recover any thing paid by him in furtherance thereof, *quære*.

***Haynes* v. *Rudd* (17 Hun, 477), reversed.**

(Submitted December 7, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made June 21, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 17 Hun, 477.)

The testimony in this cause was to the following effect: The plaintiff's son had been in the employ of the defendant as clerk, and it was claimed that he had feloniously taken and carried away money from his employer. A criminal prosecution was threatened, and to prevent it plaintiff gave his note for $250 to his wife, who indorsed it in such a manner as to charge her separate estate therewith, and delivered it to the defendant, who transferred it, before it was due, to a purchaser in good faith, to whom the plaintiff was obliged to pay it.

This action was brought to recover back the moneys paid. The questions presented arose upon the charge of the court, which is stated in the opinion.

T. W. Collins for appellant. An agreement to compound a felony is immoral and illegal. It involves criminality and moral turpitude, and all the parties thereto are equally guilty before the law, and are regarded as *in pari delicto*. (*Darmouth* v. *Bennett*, 15 Barb. 541; *Conderman* v. *Hicks*, 3 Lans. 108.) When the parties are *in pari delicto*, neither can have any remedy against the other; nor can money paid by such a party upon a contract involving criminality and moral turpitude be reclaimed at law or in equity. (*Burt* v. *Place*, 6

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Cow. 431; *Perkins* v. *Savage*, 15 Wend. 412; *Nellis* v. *Clark*, 20 id. 24; *Darmouth* v. *Bennett*, 15 Barb. 541; *Sharp* v. *Wright*, 35 id. 236; *Hill* v. *Northup*, 4 N. Y. Sup. Ct. 120; id. 300; *Woodworth* v. *Bennett*, 43 N. Y. 273; *Knowlton* v. *Congress & Empire Spring Co.*, 57 id. 518; *Loomis* v. *Cline*, 4 Barb. 453; *Gilmore* v. *Thompson*, 49 How. 198; *Collins* v. *Blanton*, 2 Wilson, 341; Story's Eq. Jur., § 379; *Smith* v. *Cuff*, 6 M. & Sel. 160; Chitty on Contracts, 635; *Worcester* v. *Eaton*, 11 Mass. 377.) Nor can it make any difference in the application of this principle that a note given upon such an agreement has subsequently been paid to a *bona fide* holder. (*Sharp* v. *Wright*, 35 Barb. 236, 238; *Gilmour* v. *Thompson*, 49 How. 198.)

C. Mason for respondent. The court committed no error in denying the motion for nonsuit. (*Mount* v. *Waite*, 7 Johns. 434; *Tracey* v. *Talmage*, 14 N. Y. 186; *Gilmour* v. *Thompson*, 49 How. 200.) The courts will not aid either party in enforcing an illegal executory contract. (*Nellis* v. *Clark*, 20 Wend. 24; *S. C.*, 4 Hill, 424.) No court will lend its aid to enforce the performance of a contract which contravenes the provisions of a positive law, or is contrary to public policy. (*Barton* v. *Pt. Jackson and Union Falls Pl'k R. Co.*, 17 Barb. 397; *Smith* v. *Albany*, 61 N. Y. 444; *Otis* v. *Harrison*, 36 Barb. 210.) The policy of the law and courts, in relation to corrupt and illegal contracts, is to leave the parties thereto to stand in the same position as they were at the time of the consummation of such illegal transaction. (*Nellis* v. *Clark*, 20 Wend. 24; 4 Hill, 424.) Whenever a contract is forbidden by the common law or by statute, no court will lend its aid to give it effect. (*Darmouth* v. *Bennett*, 15 Barb. 544; Chitty on Contracts, 570.) The law will not permit one to evade its requirements through schemes of his own, to obtain that of his adversary indirectly which he could not directly and legally enforce. (*Gilmour* v. *Thompson et al.*, 1 N. Y. Weekly Dig. 9.) A party cannot fortify his title to property by a sale, as the title to the proceeds upon sale will be the same as to the property before sale. (*Comstock* v. *Hier*, 73 N. Y. 269, 275.)

Opinion of the Court, per FOLGER, Ch. J.

FOLGER, Ch. J. The judgment in this case should be reversed. The trial court instructed the jury that if they found that the note was given on the illegal consideration of the compounding an alleged crime, it was void; that it had no legal force or effect, and the plaintiff was entitled to recover the amount of the note with interest. The trial court refused to instruct the jury that if there was no fraud, duress or undue influence on the part of the defendant, and that the note was given simply to compound a felony, then the plaintiff was not entitled to recover. We think this was error. If there was simply a compounding of felony, both plaintiff and defendant, on an equality, agreeing that the plaintiff should give his written promise to the defendant, and that, therefor, the defendant should give his oral promise to conceal the felony, and abstain from prosecuting it, and withhold the evidence of it, then they were *in parî delicto*, and the law will leave them where it finds them. (*Fivaz* v. *Nicholls*, 2 C. B. 501.) To give the plaintiff any claim to recover, he must show that he was in such plight from the force or threats of the defendant as that he was in duress, and gave the note without being willing to, to escape from the predicament in which that force or those threats put him. We will not now say, that one who aids in doing an act that is by the law made a criminal offense, may, in any circumstances, have an action to recover any thing paid by him in furtherance thereof; but we do say, that if he does it voluntarily, by which we mean without force or threats compelling his will, he may not maintain an action. The instruction and refusal of the trial court amounted to just the reverse of this and was erroneous.

The learned General Term seems to have overlooked the request to charge and refusal.

The judgment should be reversed and a new trial had, with costs to abide event.

All concur.

Judgment reversed.

Statement of case.

WILLIAM BAIRD, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

In pursuance of an invalid ordinance of the common council, the Croton aqueduct board of the city of New York advertised for proposals for paving a street. On October 15, 1869, the proposals for the work were opened, plaintiff was announced to be the lowest bidder, and the contract was awarded to him. Plaintiff's proposal was accompanied by a bond with sureties as required by the specifications. On December 18, 1869, the common council, by resolution, rescinded the ordinance. Plaintiff thereafter demanded, of the said board, that the contract should be executed, which was refused. In May, 1872, plaintiff presented the papers to the commissioners appointed under the act of 1872 (chap. 580, Laws of 1872), who gave a certificate that there was no fraud in the award. In an action to recover damages, *held*, that the award of the contract by the board was an approval of a sufficiency of the sureties and no other was needed; that the security mentioned in section 38 of the city charter of 1857 (chap. 446, Laws of 1857), which is required to be approved by the comptroller, was that required of the contractor on entering into the formal contract after the award to him, but, *held*, that the ordinance not having been legally passed all subsequent proceedings were invalid and plaintiff acquired no rights under it; that, as previous to the passage of the act of 1872, the ordinance was annulled, there was nothing for the commissioners to act upon; and that, therefore, plaintiff was not entitled to recover.

Also, *held*, that the resolution rescinding the ordinance was not required to be published, as it did not involve any of the matters mentioned in the provision of said charter (§ 38) in reference to publication.

It seems, that had the ordinance, authorizing the work, been valid and the proceedings, prior to opening the bids, regular plaintiff would have had a valid contract for the breach of which he could have claimed damages (chap. 308, Laws of 1861); and that, having such a contract, it could not be destroyed by the rescission of the ordinance.

Also, that the quantities mentioned in the specifications were proper to be taken as *prima facie* the amount of work to be done; and that the prices specified in the proposal, less what the work could have been done for, furnished the proper measure of damages.

(Argued December 9, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, in favor of plaintiff, entered upon an order made February 3, 1879, overruling defendant's exceptions and directing judgment on a verdict.

Statement of case.

This action was brought to recover damages for alleged breach of contract.

The facts established were substantially as follows: The Croton aqueduct board in pursuance of an ordinance of the common council of the city of New York, directing the paving of a specified portion of Eleventh street, which ordinance the evidence tended to show and it was assumed on the trial was illegal, advertised for proposals for the work. Plaintiff put in a proposal accompanied by a bond with sureties as required by the specification. On October 15, 1879, the proposals were opened, plaintiff was declared to be the lowest bidder and the contract was awarded to him. On October 18, his proposal was transmitted by said board to the comptroller for approval of the sureties. On December 18, the common council passed a resolution declaring that the ordinance authorizing the work was "annulled, rescinded and repealed." On December 22, the comptroller approved the sureties. Plaintiff demanded of the Croton aqueduct board that the contract should be executed and delivered to him, but said board refused to enter into a contract on the ground that the ordinance had been rescinded. On May 23, 1872, plaintiff presented the papers relating to said contract to the commissioners appointed by chapter 580, Laws of 1872, who indorsed thereon their certificate, that they were satisfied there had been no fraud in the award. Subsequently plaintiff again demanded of the commissioner of public works that he should enter into a contract, which he refused. Further facts appear in the opinion.

D. J. Dean for appellant. The plaintiff never became entitled to the contract. (Laws of 1857, chap. 446, p. 886; *Smith* v. *Mayor*, 10 N. Y. 504.) Legislative power may be lawfully exercised so as to prevent the performance of public work, even after contract has been made. (*N. Y. Prot. Ep. School*, 46 N. Y. 180; *Presb. Church* v. *Mayor*, 5 Cow. 538; *Britton* v. *Mayor*, 21 How. 251.) The act of the comptroller in approving the sureties, after the repeal of the ordinance, is a

Statement of case.

nullity, and is ineffectual to assist in creating a charge or obligation against the city. (65 Barb. 331; affirmed, 53 N. Y. 606.) Chapter 580, Laws of 1872, relates only to contracts which had been previously authorized by the common council, not to contracts made without any ordinance therefor. (53 N. Y. 606.)

Elliot Sandford for respondent. Plaintiff was entitled to damages for the wrongful abrogation of the contract, and loss of future profits. This was the difference between the contract price and what it would have cost to perform the work. (*Devlin* v. *The Mayor*, 63 N. Y. 9, 25; *People ex rel. Lunney* v. *Campbell*, 72 id. 496.) The attempt to shift the responsibility for the illegal acts of the defendant upon the Croton aqueduct board, or its successor, the department of public works, is futile. (*McAvoy* v. *The Mayor*, 54 How. 245; *People ex rel. Bradley* v. *Stevens*, 51 id. 103, 149; *In re Zborowski*, 68 N. Y. 88; Charter of 1870, chap. 137, § 67.) The contract for the work was vested in plaintiff on October 15, 1869, when the bids therefor were opened and the contract awarded to him as the lowest bidder. (Chap. 308, Laws of 1861, § 1; *Matter of the Protestant Episcopal School*, 40 How. 139, 141; *People ex rel. Frost* v. *Fay*, 3 Lans. 398, 402; *Garfielde* v. *U. S.*, 3 Otto, 242.) Plaintiff's security was adequate when the award was made. The adequacy of the security, if not to be ascertained before, related back when passed upon to the time of the award. (*Jackson* v. *Ramsey*, 3 Cow. 75; *Fuller* v. *Van-Geesen*, 4 Hill, 171; *Berley* v. *Taylor*, 5 id. 577, 587; *Wright* v. *Douglass*, 2 N. Y. 373; *Hathaway* v. *Payne*, 34 id. 92; *Lightbody* v. *N. A. Ins. Co.*, 23 Wend. 18, 24; *Clark* v. *Brockway*, 1 Abb. Ct. App. Dec. 351; *Judd* v. *Seekins*, 3 N. Y. Sup. Ct. [T. & C.] 266; *Moore* v. *The Mayor*, 73 N. Y. 238.) As plaintiff's right to the contract was vested on October 15, when it was awarded to him, it is immaterial to inquire whether the alleged resolution, rescinding the original ordinance for the work, was or was not properly passed. (*State of N. Y.* v. *Mayor of N. Y.*, 3 Duer, 119, 146, 147;

People v. *Medical Society*, 24 Barb. 570; Sedgwick on Statutes [2d ed.], 400; *Dunham* v. *Trustees of Rochester*, 5 Cow. 462; *Brady* v. *The Mayor, etc.*, 1 Barb. 584, 591.) The paper alleged to be, and introduced as, the rescinding resolution was not properly enacted, and, therefore, never existed or took effect. (*Thompson* v. *Schermerhorn*, 6 N. Y. 92; *State of N. Y.* v. *The Mayor of N. Y., supra;* Sedgwick on Statutes [2d ed.], 397, 399; 1 Dillon on Mun. Corp., § 246.) The defendant is estopped by the certificate, in plaintiff's favor, of the commission, under chapter 580, Laws of 1872, from denying his right to the contract, or claiming any efficacy for the repealing ordinance. (Bigelow on Estoppel, 45; *Gates* v. *Preston*, 41 N. Y. 113; *Morewood* v. *The Mayor*, 6 How. 386; Herman on Estoppel, 81; *Jackson* v. *Hoffman*, 9 Cow. 270; *Krekeler* v. *Ritter*, 62 N. Y. 372; Freeman on Judgments, § 249; *King* v. *Course*, 25 Ind. 202; Sedgwick on Statutes, 141, note; *Syracuse City Bank* v. *Davis*, 16 Barb. 188; *Guilford* v. *Supervisors*, 13 N. Y. 143; *S. C.* affirmed, 18 Barb. 615; *Brewster* v. *Syracuse*, 19 N. Y. 116; *Thomas* v. *Leland*, 24 Wend. 65; *Duanesburg* v. *Jenkins*, 57 N. Y. 177.) Chapter 580, Laws 1872, is declared constitutional *In re Mayer*, 50 N. Y. 504.) Under this section 7 of the act, an assessment could have been laid without ordinance. (*Matter of Peugnet*, 5 Hun, 435; affirmed, 67 N. Y. 441; *Brown* v. *The Mayor, etc.*, 63 id. 239; *People* v. *Flagg*, 46 id. 401; *People* v. *Tweed*, 63 id. 202; Cooley's Constitutional Limitations, 230; *Brewster* v. *Syracuse*, *supra.*) Whether or not an assessment could have been laid is immaterial. (*Beard* v. *Brooklyn*, 31 Barb. 142; *Cumming* v. *The Mayor, etc.*, 11 Paige, 596.)

EARL, J. This case was so tried as very imperfectly to present for our consideration the important questions which seem to be involved.

If the ordinance for paving the street was regularly passed and the proceedings prior to opening the bids were regular and valid, then we are of opinion that the plaintiff had a valid

contract with the city for the breach of which he can claim damages. It is provided in section 1 of chapter 308 of the Laws of 1861, that "all contracts by or on behalf of the mayor, etc., of New York, shall be awarded to the lowest bidder for the same respectively with adequate security, and every such contract shall be deemed confirmed in and to such lowest bidder, at the time of the opening of the bids, estimates or proposals therefor, and such contract shall be forthwith duly executed in the name of said mayor, etc., by the head of the department having cognizance thereof, with such lowest bidder." The bids for the work to be done under the ordinance were opened October 15, 1869, and it was publicly announced that the plaintiff was the lowest bidder, and the contract therefor was awarded to him. The proposal was accompanied by a bond executed by two sureties, who justified in the amount required of them in the specifications upon which the proposal was based. When the board awarded the contract they must have determined not only that the plaintiff was the lowest bidder, but the lowest "with adequate security," and hence they must have approved of the sufficiency of the security. For the purposes of the section above recited, we think no other approval of the security was needed. The approval subsequently indorsed upon the bond on the 22d of December, is simply evidence, if any was needed, that the security, at the time the contract was awarded, was adequate.

The security mentioned in section 38 of chapter 446 of the Laws of 1857 is the security required to be given by the contractor on entering into the formal contract after the contract has been awarded, and that is required to be approved by the comptroller. But whether the security which accompanies the proposal is in proper form and adequate is to be determined by the contracting board before they award the contract. Hence, upon the assumption that there was a valid ordinance, the plaintiff obtained a valid contract by virtue of section 1 cited.

Having such a contract, it was binding upon both parties and could not be destroyed by the subsequent action of the

common council rescinding the ordinance. That action might arrest the performance of the contract, but could not destroy its obligation. The city could break its contract, but would remain liable for damages for such breach.

Upon the assumption that plaintiff was entitled to recover damages, there was no error in taking the quantities mentioned in the specifications as *prima facie* the amount of work to be done. It was incumbent upon him to show for how much less than the contract price he could have performed the work, and then the jury would have had facts from which they could have arrived at the amount of his damages.

These views are expressed with a view to the new trial which we have concluded to grant. We think it sufficiently appears that the ordinance referred to was not legally passed, and was, therefore, void at the time the bids were opened and the formal award made. The complaint proceeds upon the assumption that the proceedings awarding the contract were irregular and void, else it would have contained no reference to the action of the commissioners under the act chapter 580 of the Laws of 1872. The answer alleges that the ordinance was invalid, and there was proof at the trial *prima facie* showing that it was invalid; and we think it was assumed at the trial, and even upon the argument before us, that it was invalid. If the ordinance and the proceedings under it had been valid, there would have been no occasion for the plaintiff to submit his contract to the commissioners appointed in the act of 1872. The submission of his contract to such commissioners was a confession, but not a conclusive one, on his part, that the proceedings resulting in such contract were irregular and invalid, and that he sought thereby to have the same, by the effect of the certificate of such commissioners, confirmed. If his contract was regular and valid when awarded to him, then he did not need the action of such commissioners, and they had no function in reference to it.

The ordinance not having been legally passed, all proceedings under it were wholly invalid, and the plaintiff obtained no valid contract and no rights against the defendant. The in-

valid ordinance was "annulled, rescinded and repealed" on the 18th day of December, 1869. The plaintiff could not complain of the last ordinance, as he had acquired no rights under the prior ordinance. That was invalid, and by the last ordinance was completely wiped out, as if it had never been.

It is said on behalf of the plaintiff, that the last ordinance was invalid because not published. But the law (section 37, chapter 446 of the Laws of 1857) did not require it to be published, as it did not involve the appropriation of any money, or any of the other matters mentioned in the statute.

As the first ordinance was invalid, there was nothing for submission to the commissioners under the act of 1872. Long before that act was passed and while plaintiff had no rights under the award to him, the ordinance had been annulled, and there was nothing for the commissioners to act on.

It is very doubtful whether the plaintiff could, upon any proof he could make, recover the $3.50 per day for doing the work in less time than two hundred days; but as the item is a small and unimportant one, and may not be involved upon another trial, we will notice it no further than to say that to recover for that item, the plaintiff would be obliged at least to show not only that he *could* do the work in less than one hundred days, but also that he *would* so do it; and also that by so doing it the work would not cost more than it would to take the whole two hundred days in which to do it.

The judgment should, therefore, be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

Statement of case.

WALTER S. CHURCH, Appellant, v. THOMAS B. SIMMONS, Impleaded, etc., Respondent.

Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (§ 338), containing among other things this provision that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General Term. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the General Term *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court.

Hinckley v. *Kreitz* (58 N. Y. 583), distinguished.

It seems that if after judgment of affirmance the defendant had continued in possession by permission of the plaintiff under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant.

It seems also that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts.

It seems also that the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking on the second appeal.

Church v. *Simmons* (19 Hun, 220), reversed.

(Argued December 8, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made November 26, 1879, reversing in part a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 19 Hun, 220.)

This action was brought upon an undertaking signed by defendant Witbeck as principal and defendant Simmons as surety. The nature of the undertaking and the material facts appear in the opinion.

Samuel Hand for appellant. Defendant's liability extended

to the final determination of the action. (*Robinson* v. *Plympton*, 25 N. Y. 484; *Drummond* v. *Russo*, 4 Kern. 60, 64; old Code, §§ 338, 348.) Such undertakings are not to be construed strictly in favor of the sureties, but in such a manner as to effectuate and carry out the intent of the parties. (*Traver* v. *Nichols*, 7 Wend. 434; *Ball* v. *Gardner*, 21 id. 270; *Smith* v. *Crouse*, 24 Barb. 433; *Libbles* v. *O'Connor*, 28 id. 538; *Gardner* v. *Barney*, 24 How. 467; affirmed by Court of Appeals. See *Seacord* v. *Morgan*, 3 Keyes, 638; *Bennett* v. *Brown*, 20 N. Y. 99; *Robinson* v. *Plympton*, 25 id. 484.) The fact that another undertaking was given on the appeal to the Court of Appeals cannot prejudice plaintiff. (*Wood* v. *Fisk*, 63 N. Y. 245; *Davis* v. *Van Buren*, 72 id. 587; *Risley* v. *Brown*, 67 id. 160; *Hauck* v. *Craighead*, id. 432.)

Martin I. Townsend for respondent. The defendant's liability was fixed when the appeal was taken to the Court of Appeals. (*Hinckley* v. *Kreitz*, 58 N. Y. 583.)

ANDREWS, J. The undertaking upon which the action is brought was executed on the appeal by the defendant Witbeck to the General Term, from a judgment for the recovery of the possession of real property rendered in favor of the plaintiff, for the purpose of staying the execution of the judgment pending the appeal, and is in the form prescribed by section 338 of the old Code. The undertaking contains, among the other provisions prescribed, a provision that "during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon." The judgment appealed from was affirmed by the General Term, September 28, 1865. On the 4th of October, 1865, the defendant Witbeck appealed to the Court of Appeals from the judgment of affirmance by the General Term, and perfected his appeal and gave the requisite undertaking with new sureties to stay execution pending the appeal to that court. He remained in possession of the premises recovered in the action until after the final affirmance of the judgment in this court, January 12, 1867, and in the winter of 1866–7, while the appeal to the Court of Appeals

was pending, committed the waste for which this action is brought. The referee directed judgment for the value of the use and occupation up to the amount specified in the undertaking and for the damages occasioned by the waste. The General Term reversed the judgment entered on said report as to the latter item. The only question presented on this appeal is whether the surety in the undertaking on the appeal to the General Term is liable on his undertaking for waste committed by his principal while in possession of the premises after the affirmance of the judgment on that appeal, and after the new undertaking was executed on the appeal to this court.

There can be no doubt that such liability is within the letter of his obligation. The undertaking is that the principal shall not commit, or suffer to be committed, any waste "during the possession" of the premises by the appellant. The liability is not by the language of this clause limited to waste committed during the appeal, or while the plaintiff is kept out of possession by the stay, secured by the undertaking. If such a limitation exists, it must be found in other clauses of the obligation which restrain and limit the meaning of the clause in question.

It is now understood that the contracts of sureties are subject to the same general rules of construction as other contracts. They are to have a fair and reasonable interpretation, according to the general rules of interpretation applicable to all contracts. While on the one hand sureties are not to be made liable by a strained construction of the contract, on the other, full effect is to be given to the language employed as in other cases. (*Gates* v. *McKee*, 13 N. Y. 232; *Rochester City Bank* v. *Elwood*, 21 id. 88.)

We perceive no ground upon which it can be held that the liability of the surety in this case can be limited to waste committed, pending the appeal to the Supreme Court. The defendant in the judgment, by means of the undertaking, was enabled to retain possession of the property, and so long as he retained possession in hostility to the judgment, the sureties, according to the fair import of the undertaking, are responsi-

ble for waste. The statute requires that the undertaking, in addition to the provision as to waste, shall also contain a provision to the effect that the principal shall pay the value of the use and occupation of the property, not exceeding a sum to be fixed by a judge of the court, "from the time of the appeal until the delivery of possession thereof, pursuant to the judgment." Under this provision the sureties would be liable up to the limit fixed, for the use and occupation of the property by their principal, after the affirmance of the judgment. There is nothing unreasonable in requiring that the defendant who retains possession in hostility to the judgment should execute an indemnity against his tortious injuries to the property, so long as he retains such possession. Certainly no less reason for this exists than for the requirement that he should give an undertaking to pay for the use and occupation during the same time.

The surety by this construction of the undertaking is not, as is claimed, subjected to a continuing and indefinite liability, from which he cannot be discharged so long as the plaintiff chooses to permit the principal to continue in possession. In the first place, if, after the judgment of affirmance, the continuance in possession by the defendant is by permission of the plaintiff, under an agreement between them constituting the relation of landlord and tenant, the obligation of the surety would not extend to acts of the tenant, because his possession in that case would be referable to the agreement, and not to the undertaking; and in the second place the surety would be entitled to call upon the plaintiff to execute the judgment of possession, and relieve him from liability, and an unreasonable refusal or neglect by the plaintiff to proceed after such notice would discharge the surety from liability for the subsequent acts of the defendant within the well-settled doctrine that a party holding the obligation of a surety is bound upon request to proceed with diligence against the principal, and that if he omits to do so, and damage ensues, the surety is discharged. (*Pain* v. *Packard*, 13 Johns. 173; *King* v. *Baldwin*, 17 id.

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384; *Schroeppell* v. *Shaw*, 3 N. Y. 446; *Colegrove* v. *Tallman*, 67 id. 95.)

In this case the plaintiff could not have been called upon by the sureties in the undertaking, on the appeal to the General Term to enforce the judgment, while his proceedings were stayed on the appeal to the Court of Appeals. But for any liability in consequence of the acts of Witbeck during this time, the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking of the sureties on the second appeal. (*Hinckley* v. *Kreitz*, 58 N. Y. 583.)

The case last cited is relied upon by the counsel for the sureties as an authority against the construction we have given to the undertaking in question. It was held in that case that the undertaking required to be given by an appellant, on appeal to the General Term from a money judgment "to pay all costs and damages which should be awarded against him on said appeal," did not make the sureties liable for the costs of a subsequent appeal by the same appellant to the Court of Appeals. This decision proceeded upon the ground that the words "said appeal" referred to the appeal in which the undertaking was given. In this case the language of the clause in question is not limited to waste committed during the appeal to the General Term, and no intention so to limit it can be inferred from the other provisions in the undertaking, but, on the contrary, they tend to support a construction according to its language.

The judgment, we think, should be reversed, and the judgment on the report of the referee affirmed, with costs.

All concur.

Judgment reversed.

CAROLINE F. DAVID, Appellant, *v.* THE WILLIAMSBURGH CITY FIRE INSURANCE COMPANY, Respondent.

Where a person, with intent to convey title, executes a conveyance of property in a name not his own, he is bound by the name he thus adopts,

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which will be considered as his name *pro hac vice*, and the conveyance is effectual to vest title in the grantee.

In an action upon a policy of fire insurance, upon real and personal property, the defense was that, at the time of the insurance and of the loss, the property did not belong. to plaintiff. Defendant's evidence was to the effect that H., who was then the owner, conveyed the property in form to M., a fictitious person, and then in the name of M. he conveyed it to plaintiff. The court charged the jury, in substance, that if they believed there was no such person as M., or that he never executed the conveyance, they must find for defendant. *Held*, error; that, as it was to be assumed, the conveyances were executed by H. with the intention of vesting title in plaintiff to whom they were delivered, and who the proof tended to show took and held possession of the property, although the conveyance to M., there being no such person, was invalid, yet the conveyance in the name of M. to plaintiff was valid as against H., and the plaintiff showed sufficient title to maintain her action.

(Argued December 10, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made September 26, 1879, affirming a judgment in favor of defendant, entered upon a verdict.

The nature of the action and the facts appear sufficiently in the opinion.

Walter S. Logan for appellant. Where one executes an instrument, or does an act in the name of another person, without authority or in a fictitious name, he is himself bound thereby, and can never be heard to test the efficacy of his own act to accomplish that which it purports to accomplish. (*Palmer* v. *Stephens*, 1 Den. 480; *Bank* v. *Flanders*, 4 N. H. 239; *Brown* v. *Butchers & Drovers' Bk.*, 6 Hill. 443; *Merchants' Bk.* v. *Spicer*, 6 Wend. 443; *Rossitor* v. *Rossitor*, 8 id. 495; *Petition of Snook*, 2 Hilt. 575; Edwards on Bills and Notes, 90, 91.) The proof that plaintiff was in possession is *prima facie* evidence of title to personal property, and the jury would have been justified in giving her a verdict on this evidence alone. (1 Greenleaf on Evidence, § 34; *Rowley* v. *Brown*, 71 N. Y. 87; *Fish* v. *Skeel*, 21 Barb. 333; *Donehan* v. *Wilson*, 15 id. 595; *Wilber* v. *Desson*, 53 id. 262.)

Opinion of the Court, per EARL, J.

It was not necessary for plaintiff to show an absolute and indefeasible title. A simple lawful possession gives an insurable interest. (*Sutherland* v. *Pratt*, 11 Mees. & Wells. 296; *Barclay* v. *Cousin*, 2 East, 544; *Tuckeman* v. *H. Ins. Co.*, 9 R. I. 414; *Bonham* v. *Iowa Cent. Ins. Co.*, 25 Iowa, 328; *New York* v. *Brooklyn Ins. Co.*, 41 Barb. 231; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25; *Smith* v. *Bowditch Ins. Co.*, 6 Cush. 448; *Mulligan* v. *Equitable Ins. Co.*, 16 Upper Canada, Q. B. 314; *Ætna Ins. Co.* v. *Meers*, 5 Sneed [Tenn.], 139; *Leroy* v. *Wilmarth*, 9 Allen [Mass.], 382; *Marks* v. *Hamilton*, 7 Exch. 323; *Gaulstom* v. *Royal Ins. Co.*, 1 F. & F. 276.)

Osborn E. Bright for respondent. A person who has no legal or equitable right in property has no insurable interest, and cannot maintain an action on a policy covering such property. (2 Phillips on Insurance, 601; 3 Kent's Com. 371; *Freeman* v. *Fulton Fire Ins. Co.*, 38 Barb. 247; *Murdock* v. *Chenango Ins. Co.*, 2 N. Y. 110; *Rohrback* v. *Ger. Ins. Co.*, 62 id. 47.) This is not a case where the use of a fictitious name would constitute an estoppel. (*Palmer* v. *Stephens*, 1 Den. 480; *Brown* v. *Butchers & Drovers' Bk.*, 6 Hill. 443.) Possession, unaided by proof of transfer and delivery, and unexplained, does not establish an insurable interest. (*Rowley* v. *Brown*, 71 N. Y. 87.)

EARL, J. This is an action to recover upon a fire policy issued by defendant to the plaintiff, insuring certain real and personal property claimed to belong to her. A portion of the property insured was destroyed by fire, and the defendant resists payment of the loss upon the ground that the plaintiff did not, at the time of the insurance and at the time of the fire, have any interest in the property as owner thereof.

At the trial the defendant gave evidence tending to prove that the real and personal property was conveyed by Henry J. David, who then owned the same, in form to Marx David, who was a fictitious person, and then that in the name of Marx

David he conveyed the same property to the plaintiff. This evidence was, as to the mythical character of Marx David, disputed on the part of the plaintiff. The court charged the jury "that if they believed that Marx David was a myth or that there was no such real person, or that he never executed the deed or bill of sale, it was an end of plaintiff's case and they must find for the defendant." To this plaintiff's counsel excepted, and this exception presents the sole question for our consideration. In considering this question it must be assumed that the bills of sale of the personal property and the deed of the real estate were delivered to the plaintiff, and that she took and had possession of the property, claiming to be the owner thereof, as there was proof tending to show these facts. It must also be assumed — as nothing to the contrary appears — that Henry J. David executed the conveyances with the intention to vest the title of the property in the plaintiff. The holding of the trial judge was that the mere fact that Marx David was not a real person defeated the passage of any title to the property to the plaintiff. In this I cannot doubt there was error.

The conveyances to Marx David were undoubtedly wholly invalid and inoperative, as there was no such person to take title; and if nothing more had been done, the title to the property would have remained in Henry J. David. But the title still remaining in him, he executed the bills of sale and the deed to the plaintiff, using or adopting, for that purpose, the name of Marx David. The papers thus executed were undoubtedly valid against him. In executing any instruments, I can find no authorities which hold that one is not bound by the name he adopts or uses. *Pro hac vice* it is his name. In Com. Dig. Fait E. 3, it is said: "If a man be baptized by one name and known by another, a grant by the name by which he is known shall be good;" and "if Jane B. makes a lease by the name of Joan, it shall be good." In *George* v. *Surrey* (1 Moody & Malk. 516), it was held that an indorsement of a bill could be made by a simple mark. In *Baker* v. *Dening* (8 Ad. & El. 94), it was held that a will which was required by

law to be signed by the testator could be signed by his mark simply. In *Brown* v. *The Butchers & Drovers' Bank* (6 Hill, 443), it was held that where a party placed the figures "1, 2, 8," upon the back of a bill of exchange by way of substitute for his name, intending thus to bind himself as indorser, the indorsement was valid, although it appeared that the indorser could write. In *Grafton Bank* v. *Flanders* (4 N. H. 239), it was said by RICHARDSON, Ch. J., that "if an individual assume a name for the purpose of making a written contract, and put that name to the contract with a view to bind himself, there seems to be no reason why courts should not consider the name thus assumed as his name *pro hac vice*, and hold him to fulfill the contract. And it must now be considered as settled, that he is bound by such a contract." In *Palmer* v. *Stephens* (1 Denio, 471), BEARDSLEY, J., said: "A person may execute an instrument and bind himself as effectually by his initials as by writing his name in full. Figures or a mark may be used in lieu of the proper name; and where either is substituted by a party, intending thereby to bind himself, the signature is effective to all intents and purposes." And DALY, Ch. J., in the *Petition of John Snook* (2 Hilton, 566), after a learned and exhaustive examination of the whole subject of names, said: "There are numerous cases, both in this country and in England, holding that where a man enters into a contract or does any act in a particular name, he may be sued by the name that he used, whatever his true name may be, and generally that wherever a man has done an act in a particular name, or where he makes a grant, it may always be shown in support of the validity of the act, that he was known by that name at or about the time when the act was done, though he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established the act will be binding upon him and upon others." Surely if a mere mark or figures or initials will bind one who uses them in the execution of a contract or conveyance with intent to be bound, he will, for the same reasons, be bound if he uses certain letters of a fictitious

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name with the same intent. Henry J. David assumed the name of Marx David, and executed the papers in that name, intending that they should be effectual to vest title in the plaintiff, and I know of no rule of law which requires that intent to fail.

Nearly all the property destroyed by the fire was personal; and as to that, no matter how Henry J. David executed the transfer, if he intended the title to pass, it could pass by mere delivery.

There was no proof that the name of Marx David was used for any fraudulent purpose; and if it was so used, the defendant would be concerned only with a purpose to defraud it.

The plaintiff, therefore, having shown title to the property good as against Henry J. David, and no other claimant to the property appearing, she showed title sufficient to sustain her action against the defendant.

For the error in the charge above specified the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

OLIVER BRYAN, Respondent, *v.* ALONZO C. STEWART, impleaded, etc., Appellant.

One of several executors has no authority to borrow money without the assent of the others, and such assent is not to be assumed from the fact that the loan was for the benefit of the estate.

In an action to recover for moneys alleged to have been loaned to the defendants, it appeared that defendants were executors of an estate, certain lots belonging to which were advertised for sale. Plaintiff's transactions were with defendant F., alone, and it did not appear that the other defendants gave any directions in regard to the loans, or ever promised to pay them. The referee found that the business relating to such sale was, with the assent of defendants, conducted by F., who disbursed large sums on account of the expenses of sale; that plaintiff advanced to him, for the purpose of defraying expenses, the sums mentioned in the com-

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plaint; and, as matter of law, said referee found that said advances were for the benefit and at the request of all the defendants, and that they were liable. *Held*, that the conclusions of law were not authorized by the findings of fact; that from the facts that F. conducted the business, and that plaintiff advanced moneys to defray expenses, it did not follow as a necessary or logical result that defendants reaped any benefit therefrom, or requested plaintiff to make the advances.

(Argued December 10, 1880; decided December 21, 1880.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made August 13, 1879, reversing a judgment in favor of plaintiff, entered upon the report of a referee, unless plaintiff stipulate to reduce, etc., as stated in opinion, wherein also the nature of the action and the material facts sufficiently appear.

Rufus W. Peckham for appellant.

John S. Lawrence for respondent. As the defendant, F. J. Barretto, was authorized to act for all in relation to the business of the sale, and the expenses thereof, he had the power to do any act necessary for the effectual accomplishment of the principal purpose. (Paley on Agency, 209; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Mead* v. *Shepard*, 54 Barb. 474.) A party cannot take the fruits of a transaction, and reject its burdens. (*Wilson* v. *Poulter*, 2 Strange, 859; *Palmerton* v. *Huxford*, 4 Den. 66; *Morey* v. *Webb*, 65 Barb. 22; Wharton on Agency, § 89.)

MILLER, J. The General Term, upon the appeal to it, reversed the judgment and ordered a new trial, unless the plaintiff stipulated to deduct the item of $1,000 and interest, in which case it ordered that the judgment be affirmed. The plaintiff made the stipulation required, and the defendants appealed from the judgment as thus modified.

The action was in part for money lent and advanced by the plaintiff to the defendants at three different times. The items

claimed were $1,000, $500 and $200. The evidence showed that the transaction took place with F. J. Barretto alone, one of the defendants, to whom the money was paid. The defendants were all executors of one estate, and there is no evidence that either of them, besides F. J. Barretto, had any thing to do directly with the loans made. Nor does the proof show that the defendant F. J. Barretto assumed to borrow the money on account of the other defendants. The checks were to F. J. Barretto, and no direction in regard to the loans, or express provision to pay the same by the other defendants, is shown. The case arises upon contract, and the question to be determined is, whether the proof shows that the loans were made to the defendants jointly. F. J. Barretto had no authority to bind his associates, either as executors or individually; and unless there was an assent upon their part, they are not liable. We agree with the opinion of the General Term, that the evidence was insufficient to support the judgment as to the item of $1,000. In regard to the other items of money loaned, it must be admitted that the testimony is not very satisfactory. The testimony of the plaintiff as to the item of $500 shows that after the loan of $1,000, F. J. Barretto called again and said the bills came to more money than he thought they would, and he was short of money. The plaintiff remarked to him that he supposed that Barretto was to make the advances, find this money and pay all the bills, as he had said, and that he, the plaintiff, was making them. Barretto replied: "We will have lots of money after the sale;" and the plaintiff then gave him the $500. There was no statement that the money was borrowed on account of the other defendants, or any one but by Barretto himself. He referred to the expenses as being paid by himself alone, and did not request the plaintiff to pay them, or in any way promise that the other defendants would become liable therefor; did not say that they wanted to borrow the money, or in any way intimate that the loan was to them, or otherwise than to himself individually, to whom the $1,000 loan was previously made. The evidence which is relied upon to show that F. J. Barretto was

authorized to borrow money for the other defendants is certainly not very strong. Mr. Stewart's testimony, that he never made any contracts as to the expenses of the sale or in relation thereto, and that he did not know of any being made except by F. J. Barretto, and his remark to the plaintiff that his bill was as good as gold, as well as the statement of Henry C. Barretto that he was not an acting executor, and that he assented to whatever F. J. Barretto did, but he had no money himself to spend for the disbursements of the sale, do not go very far toward showing a promise to pay, or a request to advance the money, or an assumption of personal liability by the other defendants. Nor do the other circumstances which are relied upon by the respondent tend very strongly in that direction. As to the $200, it was also shown that it was loaned on the check of F. J. Barretto; and plaintiff swears that F. J. Barretto said he wanted it to pay for a special train, to take passengers to the place of sale. The evidence is certainly very slight to establish authority in F. J. Barretto to bind the other defendants, or a ratification of his acts in borrowing the money. Conceding that the advances made by him were for the benefit of the estate, it was no more than in the line of his duty, and he was credited for what he paid personally upon the settlement It is at least very questionable whether enough appears to authorize a recovery for the items referred to. But without determining that question, we are of opinion that the findings of the referee, in the record before us, are insufficient to uphold the judgment.

The referee found that on the part of the defendants, the business relating to the sale of the lots belonging to the estate, of which the defendants were executors, was with their assent conducted by the defendant Francis J. Barretto who disbursed several thousand dollars on account of the expenses of such sale; that the plaintiff advanced to said Barretto, for the purpose of defraying expenses which had been or were about to be incurred, the various sums mentioned in the complaint; and as a matter of law, that the several advances and expenditures made by the plaintiff were made and advanced for the

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benefit and at the request of all the defendants, and that they were responsible for the repayment thereof. We think that the conclusion of law of the referee was not warranted by the findings of fact. Conceding that Francis J. Barretto conducted the business, and that the plaintiff advanced money to meet the expenses thereof, it by no means follows, as a necessary consequence and logical result, that the defendants reaped any benefit thereby or requested the plaintiff to make the advances. The defendants were executors, and one of them had no authority alone to borrow money without the assent of the others, and such assent is not to be assumed because, as found by the referee, it was for the benefit of the estate. That fact alone does not establish a liability against all of the defendants; nor can they be made jointly liable because they were jointly interested. As no request was found as a matter of fact, the conclusion of law was clearly erroneous; and the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except RAPALLO, J., absent.

Judgment reversed.

THE STEUBEN COUNTY BANK, Respondent, *v.* JOHN J. ALBERGER et al., LOUISA F. ALBERGER, Appellant.

The rule prohibiting the splitting up a single demand and bringing separate actions at law, has no application to proceedings to vacate an attachment.

So, also, the doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision, does not apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion.

The facts, therefore, that a party has made a prior motion to vacate an attachment upon the ground that it is an obstruction to the enforcement of a judgment and execution, and was defeated thereon, does not preclude a second motion to vacate the attachment as far as it affects real estate, on the ground that it is a cloud upon an alleged title thereto of the

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moving party; and this although the party might have proceeded on the first motion upon this ground also.

(Argued December 14, 1880; decided December 21, 1880.)

APPEAL from an order of the General Term of the Supreme Court in the fourth judicial department, made May 1, 1880, affirming an order of Special Term which denied a motion on behalf of Louisa F. Alberger to vacate an attachment issued in this action, and all subsequent proceedings thereunder, as to certain real estate levied upon by virtue thereof, to which real estate the moving party claimed title under a deed from defendant, Samuel F. Alberger, subsequent to the levy of the attachment. The motion was made upon the ground of the insufficiency of the affidavits upon which the writ was granted. It was opposed upon affidavits showing that a prior motion had been made by the same moving party upon the same ground to vacate the same attachment so far as it affected the private property of said defendant, Samuel F. Alberger; that upon the first motion the moving party claimed a lien upon the real and personal property of said defendant, under and by virtue of a judgment against him, and an execution issued thereon; that the first motion was denied upon the ground that the judgment was invalid, and so that the moving party was not a lienor, and that no leave had been given to renew the motion.

The further material facts appear in the opinion.

A. G. Rice for appellant. No affidavits could be used to support the original affidavits. (75 N. Y. 179.) The common-law rule of practice that a motion once denied on the merits cannot be renewed without leave of the court does not apply to a case where a second motion has been granted as to a distinct subject-matter. (*Davies* v. *Cottle*, 3 Term, 405.) A new motion is a matter of right when based upon facts arising after the first motion. (*People ex rel. Barry* v. *Mercein*, 3 Hill. 399.)

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Geo. B. Brädley for respondent. The order is not appealable because it was discretionary and does not affect a substantial right within the meaning of the Code. (*Mianney* v. *Blogg*, 41 N. Y. 521; *Selden* v. *Del. & Hud. C. Co.*, 29 id. 634; *Matter of Reeve*, 34 id. 359; *Lanton* v. *Groh*, 8 Abb. Pr. [N. S.] 385; *King* v. *Merchants' Exchange Co.*, 5 N. Y. 547; *Hoe* v. *Sanborn*, 36 id. 93; *Fort* v. *Bard*, 1 id. 43; id. 426; id. 125; *Thomas* v. *Fleury*, 26 id. 26; *Carpenter* v. *Haynes*, 1 Cod. [N. S.] 414; *German Am. Bk.* v. *Morris Run Coal Co.*, 74 N. Y. 60; *People* v. *N. Y. C. R. R. Co.*, 29 id. 418; *Martin* v. *Windsor Hotel Co.*, 53 How. 422; *Howell* v. *Mills*, 53 N. Y. 322; *Hasbrouck* v. *Kingston Board of Health*, 3 Keyes, 483; 14 Hun, 380.) The former motion to vacate this attachment was for the same relief asked upon this motion, and is a bar to this motion. (§ 686 of the new Code.) Such a motion cannot be made without leave of the court, and the decision of the Special Term in December, 1877, denying leave to renew the motion, is a bar. (*Shultze* v. *Rodwald*, 1 Abb. [N. C.] 365; *Bascom* v. *Fealger*, 2 How. 16; *Ray* v. *Connor*, 3 Edw. Ch. 499.) A motion once denied cannot be renewed as a matter of right, except upon a different state of facts arising subsequent to the decision of the former motion. (*Bank of Havana* v. *Moore*, 5 Hun, 624; *Belmont* v. *Erie R. R. Co.*, 52 Barb. 637; *Mills* v. *Roaewald*, 13 Hun, 439; *Smith* v. *Spaulding*, 3 Robt. 615; *Ramsey* v. *Erie R. R. Co.*, 57 Barb. 450; *Ray* v. *Connor*, 3 Edw. Ch. 478; *Willet* v. *Faqueweather*, 1 Barb. 72; *Pattison* v. *Brown*, 12 Abb. 142; *Desmond* v. *Wolf*, 6 N. Y. [Leg. Ab.] 389; *Sehlaman* v. *Myerstein*, 19 How. 412.) At the time of the motion Mrs. Alberger had no interest in the attached property, and was not entitled to make the motion. (*Hill* v. *Draper*, 10 Barb. 454; *Blunt* v. *Aiken*, 15 Wend. 522; *Brown* v. *Bowen*, 30 N. Y. 512.) The original affidavits together with the affidavits of Mrs. Alberger and Mr. Rice, in the moving papers are sufficient to sustain the attachment, and plaintiff may use the facts stated in the moving papers to sustain the attachment and defeat the motion. (*Peel* v. *Elliott*, 16 How.

481; *Matter of Bliss*, 7 Hill, 187; *Noble* v. *Halliday*, 1 Comst. 330-336; *Matter of Fitch*, 2 Wend. 298; *Morgan* v. *Avery*, 7 Barb. 656; *Matter of Haynes*, 18 Wend. 614; *Smith* v. *Frank*, 2 Robt. 628; *Wolf* v. *Brower*, 5 id. 602-4; *Thompson* v. *Erie R. R. Co.*, 9 Abb. [N. S.] 212, 227; *Livermore* v. *Rhodes*, 27 How. 507; 14 Hun, 380; *Whitaker* v. *Imp. Skirt Co.*, 78 N. Y. 621.) The affidavits may be used to sustain any ground for the attachment recited in the warrant. (New Code, § 683; *Morgan* v. *Avery*, 7 Barb. 656; *Matter of Griswold*, 13 id. 412; 78 N. Y. 621.)

ANDREWS, J. When this motion was noticed for the Special Term, the first motion, founded upon the judgment and execution, in favor of Louisa F. Alberger had been denied by the Special Term on the ground that the judgment, by reason of the failure of the clerk to enter it in the judgment book and other omissions, was not a valid judgment, and that she acquired no lien thereunder on the property of Samuel F. Alberger.

The present motion was not founded upon her right as lienor to move to vacate the attachment, but upon her right as grantee of Samuel F. Alberger, under the deed of December 3, 1877. The second motion was not, therefore, in the nature of an application to review the question decided on the first motion and the decision on that motion, that she acquired no lien under her judgment and execution was in no way inconsistent with a new motion founded upon her ownership of the land attached. The fact that she might on the first motion have proceeded on this ground also, did not preclude her from resorting to an independent motion to vacate, after the first motion was denied. The rule, which forbids the splitting up of a single demand and bringing separate actions at law thereon, has no application to a proceeding of this character. The grounds of intervention by the two motions were entirely distinct. In both motions she sought to vacate the attachment; but in the first she sought to remove it as an obstruction in the way of the enforcement of her judgment and execution,

and in the second as a cloud upon her title under the deed. The first motion related both to real and personal property, and the second to real property alone. Under her deed she acquired no right or title to the personal property levied on under the execution.

The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision of the former motion, cannot apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion. We are, therefore, of opinion that the denial of this motion by the Special Term, on the ground that as no leave to renew the motion having been given the decision of the former motion was a bar to the second motion, was erroneous. Moreover the doctrine of *res adjudicata* does not apply with the same strictness to decisions on motions as to judgments.

The General Term affirmed the decision of the Special Term on the first motion, and this court on appeal granted the motion, and afterward on the application of the plaintiff limited its order of reversal so as to vacate the attachment as to Louisa F. Alberger, so far only as it affected her rights under her judgment and execution against the individual property of Samuel F. Alberger. It is claimed that this order, by implication, affirms the attachment as to all rights existing in Mrs. Alberger when the attachment was issued, except those derived under her judgment and execution. The only question before this court on that motion was whether the attachment was valid as against her judgment and execution, and the court decided it was not. There could have been no intention to affirm the validity of the attachment as against any other title which she may have had, as it was vacated for inherent and jurisdictional defects in the attachment proceedings. But it is sufficient to say that when the second motion was noticed the first motion stood denied, with the denial affirmed by the General Term, and Mrs. Alberger had the right to institute a new motion founded upon a different right, which did not

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involve a review of the decision of the Special Term on the first motion.

The last decision of this court on the first motion disposed of the question as to the sufficiency of the affidavits upon which the attachment was issued adversely to the plaintiff.

We think the order of the General and Special Terms should be reversed, and an order entered vacating the attachment as against the land embraced in Mrs. Alberger's deed.

The plaintiff can contest in an action the alleged fraud in that conveyance.

All concur, except EARL, J., dissenting.

Order reversed, ordered accordingly..

ANDREW J. POST et al., Appellants, *v.* GEORGE W. CAMPBELL et al., Respondents, and PATRICK H. MURRAY, Appellant.

Under the provisions of the mechanic's lien law of 1862, for Kings and Queens counties (§ 1, chap. 478, Laws of 1862), which directs the disallowing as against lienors of any payment made by the owner "by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract," payments made in advance, although without fraud or collusion, cannot be allowed.

The statute, however, was intended to protect the lienor against payments made to the contractor or other persons to the prejudice of the lienor, and where payments in advance were made to him on account of the work or materials for which he claims a lien, he will not be permitted to dispute the right of the owner to have them credited because they were made too soon.

***It seems*, that under said act a lienor is only entitled to the value of materials and work performed within three months next preceding the filing of the notice of lien.**

In an action by a sub-contractor to enforce a lien under said act, plaintiffs claimed and were allowed, by the referee, $4,350, and interest. The referee found that the value of the work performed by plaintiffs within three months preceding the filing of notice was $1,077.17. The last installment on plaintiffs' contract was $3,350, payable ten days after the completion of the work. *Held*, that conceding the lien could be established as to the last installment by filing a notice within three months after the completion of the work, on the ground that it was not earned until

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such completion, this did not justify the including in the judgment work done previous to the three months and not embraced in that installment.

Post v. *Campbell* (18 Hun, 51), affirmed; the principle, however, there enunciated overruled.

(Argued September 30, 1880; decided January 18, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the second judicial department, made June 14, 1879, reversing a judgment in favor of plaintiffs and defendant Murray, entered upon the report of a referee. (Reported below, 18 Hun, 51.)

This action was brought by plaintiffs, as sub-contractors, to foreclose a mechanic's lien upon property in the city of Brooklyn, claimed to have been acquired under the lien law applicable to the counties of Kings and Queens (chap. 478, Laws of 1862).

The facts pertinent to the questions discussed are stated in the opinion.

William G. Wilson for (plaintiffs) appellants. The plaintiffs' notice of lien was filed within the time required by law. (Chap. 478 of the Laws of 1862, § 3; *Haden* v. *Budensick*, 6 Daly, 3.) The owners of the property are not protected from lien by their payment in advance to the principal contractor. (*Cheney* v. *Troy Hospital Association*, 65 N. Y. 282, 288.)

L. Laflin Kellogg for appellant P. H. Murray. The defendants, Campbell and Thayer, are liable on the ground that payments were made by them in advance before they were due, under their contract with Smith. (Chap. 478, Laws of 1862.) It is not necessary to show collusion when payments are made in advance. (*In re Squires*, 12 Abb. Pr. 38; *Bandmann* v. *Kreischer*, August 14, 1871, General Term of City Court of Brooklyn; *White* v. *Stansberry*, March 29, 1871, General Term, City Court; *Cheney* v. *Troy Hospital Association*, 65 N. Y. 282.) It is not necessary that all the work

under an entire contract should be done within three months of the filing. (*Hadden* v. *Buddensick*, 6 Daly, 3.)

T. Mitchell Tyng for respondents. The payments which the respondents made to their main contractor were all made in good faith, and without collusion, more than three months before either of the claimants had filed a notice of lien or served a copy thereof, and they are entitled to have them allowed. (Chap. 478, Laws of 1862; 3 R. S. [6th ed.] 797; id. 798; *Payne* v. *Wilson*, 74 N. Y. 348, 355; Kneeland on Mechanics' Liens, pp. 125, 126, § 112; *Schneider* v. *Hobein*, 41 How. 232; *Thompson* v. *Yates*, 28 id. 142; *Lombard* v. *Syracuse, etc., R. R.*, 55 N. Y. 491; *Crane* v. *Genin*, 60 id. 127; *Redburn* v. *Seneca L. G. & W. Co.*, 67 id. 215; *Hall* v. *Sheehan*, 69 id. 918.) In no event could the claimants, under section 3 of the act in question, file or sustain liens for work, labor and materials which were not performed and furnished within three months prior to the date on which they respectively filed their notices of lien. (*Spencer* v. *Barnett*, 35 N. Y. 94; *Lilley* v. *Hotel Co.*, 9 Hun, 424.)

RAPALLO, J. We concur in the conclusion of the learned referee in respect to the construction of the lien law applicable to Kings and Queens counties (Laws of 1862, chap. 478, § 1), which provides for disallowing as against lienors any payment made "by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract." We think that the intention of this provision was to exclude payments made either by collusion or in advance of the terms of the contract. It is, perhaps, possible to construe the provision so as to make the word "collusion" apply both to payments made for the purpose of evading the act and to payments made in advance, but we think the more natural construction of the sentence is that payments made by collusion for the purpose of evading the act constitute one class of payments to be disallowed, and payments made in advance of the terms of the con-

tract constitute another class. It can hardly be doubted that this was the intention of the act, when we consider its general scheme, and that upon which other similar acts are framed. The general purpose of all these acts is to constitute the payments stipulated to be made by the owner to the contractor, a fund (Laws of 1830, chap. 330, § 4) for the protection of materialmen and sub-contractors or mechanics, whose materials and labor actually produce the building, and go to entitle the contractor to his payments, and these laws provide the machinery by which such sub-contractors, mechanics and materialmen may impound these payments in the hands of the owner and acquire a lien on the property for the sums unpaid on the contract. The contract and the payments to become due thereunder thus constitute the security of the mechanics employed by the contractor, and they furnish work and materials on the faith thereof. These payments are usually made to fall due at the various stages of the progress of the work, and those employed or furnishing materials to earn the payments, if they inform themselves of the terms of the contract, as they should do, will always know when the payments accrue. It is manifest that if the owner were at liberty to anticipate the payments, the security of the mechanics and materialmen would be very shadowy; for when they came to file their notices of lien, they might find that all the payments had been anticipated and that there was nothing due or to become due which they could impound. To provide against this danger, payments in advance have been provided against in most of the laws upon this subject. It cannot be material whether the payments in advance are made for any fraudulent purpose, or by collusion, or innocently, so long as they are voluntary. The effect is the same upon those who are looking to the accruing payments as their security. The sub-contractor who is relying upon the right which the lien law gives him to impound all payments which are due when he performs his work, or which may thereafter accrue according to the terms of the contract, might, if such advances were permissible, find when his work is done that the fund upon which he relied has disappeared.

The damage to him is the same whatever may have been the motive of the advance.

The various lien laws which have been passed from time to time differ in their provisions. Some of them provide only against collusive payments, others provide also against payments in advance; but when provision is made against payments in advance, I find none which require that such payments in advance be made by collusion or fraudulently. The act of 1830, applicable to the city of New York, chapter 330, section 5, disallows as against the lienor a payment to the contractor "by collusion *or otherwise*, in advance of the sum due on the contract." The act of 1852, applicable to Westchester and other counties, chapter 384, section 3, contains the same provision in the same language. The act of 1854, chapter 402, section 3, provides against payments on the contract by the owner "by collusion for the purpose of avoiding the provisions of the act, or before the right of any claimant to file a note of lien has expired, or in advance of the terms of any contract." The language of this act is very similar to that of the act of 1862, now under review, but it seems quite plain that payments in advance are a prohibited class of payments distinct from collusive payments. The act of 1854 was amended by chapter 558 of the Laws of 1869, and made applicable to all the counties in this State except Erie, Kings, Queens, New York and Onondaga, and was further amended by the act of 1873, chapter 489. Section 3 of the act of 1854 was, by this act of 1873, amended by striking out the provision against payments in advance, leaving in force only a provision against payments "by collusion for the purpose of avoiding or with intent to avoid the provisions of this act." This act did not affect the provision against payments in advance contained in the act of 1862, which applies to Kings and Queens counties, but left that provision in full force. The course of legislation on this subject clearly shows that a distinction was made between collusive payments and payments in advance.

If in the other acts referred to, or in the act of 1862, it was intended to exclude payments in advance only when collusively

made, it is difficult to understand why payments in advance were specified at all, for if made by collusions the language in respect to collusive payments would be ample to cover all fraudulent prepayments.

The case of *Cheney* v. *Troy Hospital Association* (65 N. Y. 282) puts the same construction as that adopted by the learned referee upon precisely similar language used in the Rensselaer county mechanics' lien law, and we think that is its reasonable construction.

Adopting that construction, however, a further question is presented whether the lienor can avail himself of the right to have payments disallowed to the owner on the ground that they were in advance of the terms of the contract, when such payments in advance were made to the lienor himself, on account of the work and materials for which he claims a lien. We think there would be manifest injustice in sustaining such a claim, and permitting the lienor, after having once received a payment from the owner on account of the money coming to the contractor upon his contract, to recover the same money a second time from the owner on the ground that when the payment was made it was not actually due to the contractor, according to the terms of the contract. The statutory provision was intended to protect the lienor against payments made to the contractor or other persons, to the prejudice of the lienor; but where the lienor has himself received the money, he surely ought not to be permitted to dispute the right of the owner to be credited with the payment because it was made too soon. It is true the words of the statute are that if the owner shall pay "any person" by collusion or in advance, and the amount still due the contractor after such payment shall be insufficient to satisfy the demands of the claimants under the lien law, the owner shall be liable for the amount that would be owing to the contractor if no such payment had been made. But in construing the term "any person," it must be understood to mean any person other than the claimant. It could not have been intended that after having received the money himself, as a payment upon the contract, the claimant should be allowed to

claim the same installment again. In the present case the owners had, long before the notice of lien was filed, paid to the contractor and upon his order the whole amount of the contract price of the building and upward of $1,000 in addition, and the referee finds that all these payments were made without collusion and in entire good faith. The last installment payable upon the contract was $5,000, and this was to be paid when the building was completed. On the 9th of February, 1878, and when very little remained to be done in the building, the owners paid to the claimants, Post & McCord, out of this last installment the sum of $2,500, on an order drawn in their favor by the contractor upon the owners. The referee has found that when this draft was paid to the claimants the building had not been fully completed, a small amount of work still remaining to be done, and consequently he has disallowed this payment, as a payment in advance, and included it in the amount found due from the owners to the contractor, for which he has rendered judgment in favor of the claimants, Post & McCord, thus compelling the owners to pay the same amount to them a second time.

We think this was erroneous, and inasmuch as the whole amount of the recovery of Post & McCord cannot be sustained without the disallowance of this payment, the court below was justified in granting a new trial. The case contains all the necessary findings and exceptions to raise the point distinctly.

The respondent further contended before the referee that the claimants were entitled to recover only for the value of the work and materials furnished and performed within three months next preceding the filing of the notice of lien, and such is the provision of the statute. The notice of lien of Post & McCord was filed on the 21st of May, 1878. The whole contract-price of the work, $51,000, and more, had been paid by the owners to the contractors on the 13th of February, 1878. The claimants Post & McCord, by their notice of lien, claimed the sum of $4,350, with interest from May 13, 1878, for work done by them under a sub-contract, by which they were to be paid in installments, the last installment being $3,350, payable

ten days after the completion of the whole work. The referee finds that the value of the work performed by them within the three months immediately preceding the 21st of May, 1878 (the date of the filing of the notice of lien), amounted to $1,077.17. Yet he has rendered judgment against the owners for the full sum claimed, amounting to $4,543.69, with interest, and declaring them entitled to a lien therefor, notwithstanding the objection that the lien was valid only to the extent of the value of the work, etc., done and furnished within the three months.

From the opinion of the referee it appears that he places this conclusion upon the ground that the last installment of the sub-contract did not become payable until within the three months, and that although the point was made that the lien must be limited to the work done within the three months, the point was not specifically taken that the plaintiffs' recovery should be limited to such last installment. It seems to us that the point stated in the opinion to have been taken was sufficient, and that the exception to the conclusion that the plaintiffs are entitled to a lien for $4,543.69 raises the question what should be the amount of the recovery.

Inasmuch as the work done within the three months is found to have been only $1,077.17, it is evident that all the rest of the $4,543.69 must have been earned prior to that time, and that no lien could be obtained therefor unless it be to the extent of the last installment payable on the plaintiffs' sub-contract. And if the referee was right in holding that, as to that installment, the lien could be established on the ground that it was not earned until the completion of the work, and that consequently a lien therefor could be obtained by filing a notice within three months after such completion, still that would not justify him in including in the judgment work previously done and not embraced in that installment. Even if the claim of the defendants that the recovery should be limited to the work actually performed within the three months could be partially answered by showing that the lien might be made to cover the whole of the last installment, they did not

thereby lose the right to except to the allowance of a lien for other work done outside of the three months which could not, upon any theory, be included. The allowance to the plaintiffs of this excess was also, in our judgment, erroneous.

The lien of the claimants Post & McCord was held to be prior to that of the claimant Murray. The allowance of the credit of $2,500 paid to Post & McCord on the 9th February, 1878, would reduce the amount due from the owners, even if all the other prepayments be disallowed them, to a sum insufficient to pay the claim of Post & McCord, and, therefore, no lien existed in favor of the appellant Murray.

The order of the General Term should be affirmed and judgment absolute be rendered against the appellants on their stipulations.

All concur.

Order affirmed and judgment accordingly.

GEORGE S. HAZARD et al., Respondents, *v.* JOSIAH M. FISKE et al., Appellants.

Plaintiffs made advances to N. on pledge of the bill of lading of a cargo of corn, of which N. was general owner, and which was consigned to him at B. Upon arrival of the corn, plaintiffs consented that N. might designate the elevator in which it should be stored; this he did, and upon receiving from the master of the vessel the elevator receipt, instead of procuring a warehouse receipt in the names of plaintiffs, and delivering it to them, as according to usage it was his duty to do, he obtained such receipt in his own name. The plaintiffs knew that according to the usual course of dealing, the master would deliver the elevator receipt to the consignee on payment of freight, and that on such receipt a warehouse receipt would be issued to the consignee, or in the name of whom he should direct. They expected N. to pay the freight, and intended him to receive the elevator receipt. The corn arrived November 8th; plaintiffs paid no attention to its possession until November 18th, when they demanded repayment of their loan. Meanwhile, N. had shipped the corn to New York by canal, and on the faith of the canal boat bills of lading obtained advances from defendants. *Held*, that conceding plaintiffs' claim could not be enforced as against defendants, as to which *quære*, yet

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it remained good as against N. or his creditors, and defendants would be entitled to protection against such claim only to the extent of their advances, and so far only as a lien on the corn or its proceeds was necessary to secure such advances; and, it appearing that defendants had in their hands other funds belonging to N. upon which they had a lien for, and had the right to apply them to, the payment of these advances, and which after notice of plaintiffs' claim they paid over to another on the order of N. *Held*, that plaintiffs were entitled to demand, and upon refusal to pay, to maintain an action to recover the corn or its proceeds.

Also, *held*, that plaintiffs' right to have such other funds applied to cancel defendants' lien was superior to the title thereto of an assignee in bankruptcy of N., or to that of any person to whom N. might have assigned the same.

(Argued October 7, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made on the second Tuesday of June, 1879, affirming a judgment in favor of plaintiffs entered upon a verdict and affirming an order denying a motion for a new trial. (Reported below, 18 Hun, 277.)

The nature of the action appears by the abstract of the complaint contained in the opinion.

It appeared in substance on the trial, that Ozias L. Nims, who (in copartnership with one David Long) was doing business under the name and style of "O. L. Nims, Agent," had directed one J. B. Lyon, who was their agent at Chicago, to purchase for the firm 24,000 bushels of corn, which Lyon did, and shipped the same on the schooner Czar on account of said Lyon to the care of Nims. To raise the money at Chicago to pay the purchase-price of the corn, Lyon drew his draft on Nims for $12,610.59, payable to the order of the cashier of a bank in Chicago and attached the same to the bill of lading issued by the master of the Czar. Lyon delivered the bill of lading, with the draft attached, to the said bank, which discounted it and sent the draft with the bill of lading forward to a bank at Buffalo for collection. The draft and bill of lading arrived at

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Buffalo on the 30th day of October, 1871, and on that day the plaintiffs, also grain dealers at Buffalo, at the request of Nims and as a loan or advance on the cargo of the Czar, loaned to Nims $12,600, with the agreement that they should hold the bill of lading as collateral security for the repayment of the money, and took from Nims a receipt and agreement as follows:

"BUFFALO, *October* 30, 1871.

"Received of G. S. Hazard & Co. twelve thousand and six hundred dollars, advance on 24,000 bushels corn — schooner Czar — bill of lading held as collateral.

"O. L. NIMS, *Agent*,
"per LEWIS M. EVANS."

At the time the receipt was given, the bill of lading was delivered to Hazard & Co., of which firm plaintiffs were the members, indorsed by "O. L. Nims," and by "O. L. Nims, Agent."

The schooner Czar arrived at Buffalo on the 7th or 8th of November following the transfer of the bill of lading.

According to the custom and ordinary course of business, the master of the schooner Czar would seek out the person to whose care the cargo was consigned, and deliver it to him or put it into such elevator as he should direct, and there was a custom among grain dealers at Buffalo, that when advances were made on a cargo of grain and the bill of lading assigned, the consignee would procure the elevator's warehouse receipt in the name of the person to whom the bill of lading was assigned, and the assignee generally intrusted the performance of that duty to the general owner of the grain, though in some instances those who had made advances on cargoes gave notice to the proprietors of the elevator that the warehouse receipt must be made out to the party to whom the bill of lading was assigned. In this instance, the master, having notified Nims of the arrival of the cargo, was directed by the latter, with the assent of the plaintiffs, to deliver the cargo into an elevator known as the "City Elevator," and he did so, taking a ware-

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house receipt known as an "elevator ticket" for the same. The master then took the "elevator ticket" to the office of the "Western Elevating Company" who then had charge of the running of several elevators in Buffalo, and procured the warehouse receipt of that Company for the said cargo of corn, upon the indorsement and delivery to it of the "elevator ticket," which warehouse receipt certified that said company had received said cargo in store subject to the order of O. L. Nims. This warehouse receipt the master took to the office of O. L. Nims and delivered to him on being paid his freight.

By some neglect or inadvertence the plaintiffs never got possession of the warehouse receipt, and Nims, without the consent or knowledge of the plaintiffs, caused the corn to be shipped on four canal boats, after mixing it with other corn belonging to him, consigned to the defendants constituting the firm of J. M. Fiske & Co., commission grain dealers in New York, and obtained from the master of each of said canal boats a canal shipping bill or bill of lading, consigning the corn embraced in that cargo to the care of said firm at New York, and drew his draft on the firm against each of the said canal cargoes, attached the draft in each case to the canal shipping bill and procured the several drafts to be discounted at some one of the Buffalo banks. The said several drafts were sent to New York for collection and were presented to and paid by said J. M. Fiske & Co. without any notice of any claim of plaintiffs to the corn.

The further material facts are set forth in the opinion.

William H. Greene for appellants. The rule at common law, "That whenever one of two innocent persons must suffer by the act of the third, he who enabled the third person to do or occasion the injury or commit the fraud, if it be one, must sustain the loss," is applicable to this case. (*Dows* v. *Green*, 24 N. Y. 638; *Voorhis* v. *Olmstead*, 66 id. 113, 117.) Plaintiffs lost their lien under the statute of frauds as against the defendants, *bona fide* purchasers. The plaintiffs' lien depended on their keeping their possession from Nims, as between them

and *bona fide* purchasers. (2 R. S. p. 135, § 5; *Kyser* v. *Harbeck*, 3 Duer, 373, 390, 392; *Rowley* v. *Bigelow*, 12 Pick, 307; *Morey* v. *Walsh*, 8 Cow. 238; *Root* v. *French*, 13 Wend. 572; *Evans* v. *Salters*, 12 Pick. 306; *Stevens* v. *Hyde*, 32 Barb. 572.) Defendants' title is good as against the plaintiffs by force of the "Factor's Act," first section. (Laws of 1830, chap. 179, p. 203; *Dows* v. *Greene*, 24 N. Y. 638; 32 Barb. 490; 60 N. Y. 40, 47.) The third section of the "Factor's Act" protects the defendants as *bona fide* purchasers. (*Bates* v. *Cunningham*, 19 N. Y. Sup. Ct.; 12 Hun, 412; *Howland* v. *Woodruff*, 60 N. Y. 74; *Pegram* v. *Carson*, 10 Bosw. 505.) As soon as the master delivered the cargo to Nims, the appointed agent, in the usual way of business, his possession was at an end and the bill of lading became a worthless piece of paper, both by law and in fact, so far as it any longer represented or symbolized the possession of the cargo. (*Morgenstein* v. *Barber*, 2 C. P. 38–45; *Farmers' Nat. Bk. of C.*, 57 N. Y. 37; 2 Kent's Com. 549.) The plaintiffs have proved no lien or title as against the defendants. (57 N. Y. 28.)

Sherman S. Rogers for respondents. Plaintiffs established in themselves a special property in the grain to the extent of the advances made by them. (*Marine Bank* v. *Fiske*, 71 N. Y. 353; 9 Hun, 363; *Man. & Tr. Bank* v. *Farmers & Mechanics' Bank*, 60 N. Y. 40; *First Nat. Bank of Toledo* v. *Shaw*, 61 id. 283; *City Bank of R.* v. *Jones*, 4 Comst. 497; *First Nat. Bank of C.* v. *Kelly*, 57 N. Y. 34; *City Bank of Rome* v. *R. & W. R. R.*, 44 id. 136; *Dows* v. *Nat. Ex. Bank of M.*, 91 U. S. 618.) The tortious shipment of grain by a party gives no protection to a consignee or other party advancing or buying on the strength of the bill of lading. (*Covill* v. *Hill*, 2 Seld. 374; *S. C.*, 4 Den. 323; 1 Comst. 522; *Man. & Tr. Bank* v. *Farmers & Mechanics' Nat. Bank*, 60 N. Y. 40, 52; *Wilson* v. *Nason*, 4 Bosw. 155; *Blossom* v. *Champion*, 37 Barb. 554; *Saltus* v. *Everett*, 20 Wend. 567; *Barnard* v. *Campbell*, 55 N. Y. 456; 58 id. 76; *First Nat. Bank of T.* v. *Shaw*, 61 id. 283; *Marine Bank* v. *Fiske*, 71

id. 353.) The actual possession of property is not sufficient to protect a purchaser from the party in possession as against the true owner. (*Ballard* v. *Burgett*, 40 N. Y. 314; *Spaights* v. *Hawley*, 36 id. 441; *Austin* v. *Dye*, 46 id. 500; *Cook* v. *Adams*, 1 Bosw. 155; *Weaver* v. *Barden*, 49 N. Y. 287; *McGoldrick* v. *Willett*, 52 id. 612; *Dows* v. *Perrin*, 16 N. Y. 325, and c. c.; *F. & M. Nat. Bank* v. *Logan*, 74 N. Y. 568.) The interest of the plaintiffs was not that of a mortgagee, but of a pledgee or special owner of the grain. (*Bank of R.* v. *Jones*, 4 Comst. 507; *First Nat. Bank of Toledo* v. *Shaw*, 61 N. Y. 283; *City Bank* v. *Rome, W. & C. R. R.*, 44 id. 136; *Cayuga Co. Bank* v. *Daniels*, 47 id. 632; *Dows* v. *Nat. Ex. Bank*, 91 U. S. Sup. Ct. 618.) Nothing was done by the plaintiffs to divest their lien, if their interest be held to be that of pledgees. (*Hayes* v. *Riddle*, 1 Sandf. Sup. Ct. 248; Story on Bailment, §§ 58, 299; *Macomber* v. *Parker*, 4 Pick. 497; *Thayer* v. *Dwight*, 104 Mass. 254; *Marvin* v. *Wallace*, 6 Ellis & Black. 726; *Dows* v. *Nat. Ex. Bank*, 91 U. S. 618.) Against a tortious retaking of possession by a mortgagor, the mortgagee is not bound to file. (*First Nat. Bank of C.* v. *Kelly*, 57 N. Y. 34.)

RAPALLO, J. A large portion of the argument on the part of the appellants is devoted to maintaining the position that when the schooner Czar arrived at Buffalo, O. L. Nims took the 24,000 bushels of corn, which were by the bill of lading consigned to him, into his possession, and with the consent of the plaintiffs stored them in the city elevator and took out the warehouse receipts in his own name; and that he also, with their consent, shipped the corn, in his own name in the canal boats. Had these facts been clearly established there can be no doubt that the defendants, by making advances to Nims in good faith on the credit of the canal boat bills of lading, would have acquired a valid lien upon the corn, as against the plaintiffs. (*Voorhis* v. *Olmstead*, 66 N. Y. 113.) Nims is admitted in the case to have been the general owner, the plaintiffs claiming only a lien thereon for their advance, and if they volun-

tarily placed Nims in possession of the corn, their alleged lien could not be enforced against a *bona fide* purchaser or pledgee of Nims. To retain their lien it was necessary that they should retain the possession. Furthermore the defendants would have been clearly within the protection of the Factors' Act.

But it is by no means a conceded fact in the case that the plaintiffs did intrust Nims with the possession of the corn, or consent to his taking out the warehouse receipts in his own name, or to his shipping the corn on board the canal boats in his own name. If they had done either of these things no custom of the city of Buffalo could have sustained their lien as against the defendants, who were subsequent *bona fide* pledgees of Nims. But the plaintiffs contend that all that they consented to was that Nims might designate the elevator in which the corn should be stored, and that when it was received there, and the master of the schooner delivered to him the elevator receipt, it was his duty, according to the usage, to obtain a warehouse receipt in the name of the plaintiffs and deliver it to them. That this was consequently the implied understanding between the parties, and the plaintiffs never intended to intrust Nims with the possession and control of the corn. That it was a fraud upon them to take out the warehouse receipt in his own name and that it was only through inadvertence that they omitted to obtain from him the proper receipt, they supposing that they had done so. There was evidence to sustain this theory, and also to show that he concealed from them the fact of his shipping the corn on the canal boats.

The charge of the court is not printed in the case and we cannot, therefore, know what questions were submitted to the jury. We must, however, assume, in support of the judgment, that the questions whether the plaintiffs voluntarily intrusted Nims with the possession of the corn or consented to his taking the warehouse receipt in his own name were submitted to the jury and passed upon by them adversely to the defendants' claim, and we must, therefore, examine the case as it stands upon the uncontroverted facts.

These present questions of considerable difficulty. Nims is

admitted to have been the general owner of the corn. So long as it remained on board the Czar, the plaintiffs by reason of the indorsement to them of the bill of lading were in possession as pledgees. But when the cargo had been discharged into the elevator, the effect of the bill of lading ceased. The possession then became vested in the party taking out the warehouse receipt. If Nims, having undertaken to take out a receipt in the names of the plaintiffs, fraudulently took one out in his own name, this was a conversion of the grain by Nims, for which the plaintiffs could have maintained an action against him, or they could have treated Nims as their agent, and asserted their title and right of possession against him and his bailee. But in respect to third parties who may have dealt with Nims on the strength of his possession and apparent right, different questions arise, and it must be considered how far the acts of the plaintiffs, or even their omissions, may have affected their rights.

On this branch of the case the plaintiffs plant themselves upon the general rule of law that the purchaser of personal property takes only such title as the seller has to convey, or is authorized to transfer, and that the mere possession of the seller is not such evidence of title in him as will protect one taking from him, against the true owner, even though the possession may have been intrusted to the seller by the true owner.

This rule is not, however, applicable in its full extent to the present case. It must be remembered that Nims was the owner, and the plaintiffs had only a lien for their advance. If the plaintiffs had been the general owners, the possession of Nims, whether acquired fraudulently or with the consent of plaintiffs, would have afforded no protection to the defendants. But the plaintiffs being merely pledgees, if they permitted the pledgor and general owner to assume the possession and control of the corn, and voluntarily placed him in a position which enabled him to invest himself with the *indicia* of title, it is a serious question how far they may have disabled themselves from asserting their lien against a subsequent *bona fide* purchaser or

pledgee from him, although it might continue as against Nims or his creditors.

In its facts this case differs in some respects from those which have been before us on previous occasions, arising out of the transactions of Nims and other parties in Buffalo.

Nims was, by the lake bill of lading, consignee of the corn. This the plaintiffs knew; and they also knew, as testified to by them, that by the usual course of dealing the master of the Czar, which had the grain on board, would discharge the cargo at whatever elevator the consignee directed, and would take the elevator receipt and deliver it to the consignee on payment of the freight, and that on that receipt a warehouse receipt would be issued to the consignee, or in the name of whomever he should direct. When the vessel arrived at Buffalo they asked Nims in what elevator he intended to store the corn, and he told them the city elevator. They expected him to pay the freight, and, consequently, intended that he should receive the elevator receipt from the master and that he should thereupon obtain a warehouse receipt. The elevator receipt was the voucher upon which the warehouse receipt was issuable, and it is plain that they intended that this voucher should come into his hands, and they knew that this would place it in his power to take the warehouse receipt in his own name. They say that, according to the custom, he should have taken the warehouse receipt in their names and delivered it to them, but nothing appears to have been said upon the subject, nor does it appear that they ever asked him for it, though they say they supposed they had it, until, on looking for it after his failure, they ascertained that they did not have it. They testify that they could have protected themselves by giving notice of their lien to the elevator association and requiring that the receipt should be issued to them, but that nothing of the kind was done. The witnesses who testify to the custom of intrusting the taking out of the warehouse receipt to the pledgor under such circumstances, also testify that some lenders were in the habit of giving notice of their lien to the elevator and seeing that the warehouse receipt was issued in their names, and that it

was usual to do so when there was any want of confidence in the pledgor; when, as they express themselves, he was at all shaky. The plaintiffs appear to have paid no attention to the matter of the possession of the corn, from the time of the arrival of the Czar at Buffalo, November 8, 1871, until November 18, 1871, when they demanded of Nims repayment of their loan. In the meantime Nims, by reason of the possession which he had thus acquired, was enabled to ship the corn to New York and obtain from the defendants the advance which they made on the faith of the canal boat bills of lading.

There is much force in the argument that the plaintiffs had, either negligently or through their confidence in Nims, permitted him to take possession of the corn, and that they had lost their lien as against his subsequent *bona fide* pledgees without notice of the rights of the plaintiffs. But there is another point in the case which relieves us of the necessity of deciding that question. Assuming that the defendants are right in their claim that the plaintiffs' lien could not be enforced as against theirs, yet it remained good as against Nims or his creditors. The defendants would be entitled to protection against the plaintiffs' claim, only to the extent of the defendants' advances to Nims, and so far only as a lien on the corn or its proceeds was necessary to the security of their advances. If Nims repaid these advances, the plaintiffs would be justly entitled to demand of the defendants the corn, or its proceeds. The same result would follow if the defendants had in their hands other funds of Nims, which they had the right to apply to the payment of these advances, and instead of so applying them they paid them over to Nims or on his order after notice of the rights of the plaintiffs. The complaint alleges that the defendants sold the corn which was pledged to them by Nims, and that the net proceeds of the sale amounted to about $11,605, but that the defendants had in their hands other property, money and securities, which they were entitled to apply to the reimbursement of their advances to Nims, and which, as between plaintiffs and defendants, ought to have been so applied. It appeared in evidence that there

were large dealings between the defendants and Nims prior to and at the time of the transaction now in question, which consisted of shipments of grain made by Nims to the defendants, for sale, on which shipments advances were made as in the present case. That these dealings were had under an agreement by which the defendants had a general lien on any balance in their hands, for any amount due them from Nims. Consequently if they had a general balance in their hands belonging to Nims, sufficient to repay the advances made on the corn now in question, and the plaintiffs had a right as against Nims to that corn or its proceeds, the defendants, after receiving notice of the plaintiffs' rights, could and should have resorted, in the first instance, to such general balance for their reimbursement, instead of resorting to the fund to which the plaintiffs were equitably entitled. It appears that on the 23d of November, 1871, immediately after the failure of Nims and the discovery that he had shipped to the defendants the corn pledged to the plaintiffs, the plaintiffs, by letter, gave notice to the defendants that the corn in question belonged to the plaintiffs, and had been shipped by Nims without their consent or authority, and that they held the defendants responsible for the corn, and requested them to hold it subject to the order of the plaintiffs. This was sufficient to require the defendants to inquire into the rights of the plaintiffs, and render them accountable to the plaintiffs for the corn, except to the extent which was necessary for their own protection.

But it was proven on the trial that at the time that notice was received, the defendants had in their hands property of Nims, consisting of consignments of grain, from which they subsequently realized a balance of more than $35,000 over and above all advances, etc., on which balance, under their agreement before mentioned, they had a lien for any amount due them from Nims.

This was much more than sufficient to enable them to reimburse themselves their advance upon the corn in controversy, without resorting to that corn or its proceeds, and it was clearly their duty to respect the rights of the plaintiffs by re-

taining those advances out of this general balance, and thus exonerate the proceeds of the corn pledged to the plaintiffs; but instead of so doing, they paid over this sum of $35,000 and upwards, in May and June, 1873, to John M. Hutchinson, upon an order in his favor given him by Nims, on the 15th November, 1871, for the amount of the surplus of his consignment to the defendants, after repaying to themselves their advances thereon. In these consignments were included those of the corn on which the plaintiffs had advanced, and on making this payment the defendants took a bond of indemnity from Hutchinson.

We are of opinion that after having received notice of the plaintiffs' rights, and after having ascertained that they had a fund belonging to Nims sufficient to repay all their advances, and subject to a lien therefor, without resorting to the proceeds of the plaintiffs' corn, the defendants should be deemed to have held those proceeds to the use of the plaintiffs, and that the payment of them to Hutchinson was in their own wrong.

The only answers made by the appellants to this point are first, that the plaintiffs cannot recover in this action for the proceeds of the corn as money had and received to the plaintiffs' use, but only as an action of tort for the conversion of the corn; and secondly, that if the defendants had no demand of their own against Nims, for which they had a lien upon the proceeds, the money would belong to the assignee in bankruptcy of Nims, or to John M. Hutchinson, in whose favor the draft of November 15, 1871, was drawn.

In respect to the right of the plaintiffs to recover the proceeds of the corn in this action, it appears that the complaint is framed with the express view of reaching them. It sets out the plaintiffs' lien upon the corn, its shipment, without their authority, to the defendants, and notice from the plaintiffs to the defendants of the plaintiffs' claim to the corn. It then avers the sale by the defendants, and their receipt of the proceeds, and also the claim of the defendants that it was lawfully sold by them by virtue of a transfer to them to secure certain advances to Nims, and that they were entitled to apply the

proceeds so far as necessary to the reimbursement of such advances, and then proceeds to aver that the defendants had in their hands other property, money and securities which they were entitled to apply to the reimbursement of their advances to Nims, and which as between the plaintiffs and defendants, the plaintiffs ought so to have applied, and, therefore, the proceeds of the corn were received to the use of the plaintiffs.

The plaintiffs then allege that, not knowing whether in fact their grain was lawfully sold by the defendants, they have demanded the proceeds, etc.

It seems to us that this action is rather in the nature of an equitable action to reach those proceeds than an action for a conversion of the grain. It would be difficult under the allegations of the complaint to maintain it as an action of tort. The plaintiffs do not aver a wrongful conversion by the defendants, but ignore the question whether or not the corn was lawfully sold by them.

The second ground taken by the appellants is equally untenable. The plaintiffs were clearly entitled as between them and Nims to the corn or its proceeds. Their title was superior to that of any creditor or assignee in bankruptcy of Nims, or to that of any person in whose favor Nims might draw for such proceeds, or to whom he might assign them; all such transferees took subject to the prior equities of the plaintiffs. No one but the defendants appear to have been in a position to dispute the equities of the plaintiffs, and their right to do so existed to the extent only which was necessary to secure the payment of the advances which they had made on the strength of the apparent possession and title of Nims. If they could reimburse themselves from other money of Nims in their hands, after notice of the plaintiffs' rights, equity clearly required them to do so.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

SAMUEL SCHIFFER, Respondent, *v.* JOHN G. DIETZ, Appellant.

A vendee, entitled to rescind a sale for fraud, must act promptly on discovery of the fraud, and restore or offer to restore the property. By dealing with it as owner after such discovery he deprives himself of this remedy.

Where fraud upon the part of the vendor is claimed on the sale of real estate, a continuance in possession by the vendee after discovery of the fraud is evidence of an intent to abide by the contract.

Defendant, in execution of a contract to convey certain premises to plaintiff by deed, with warranty free and clear from all incumbrances, executed a conveyance May 10, 1872. At the time of the execution of the contract and of the delivery of the deed, defendant was married but his marriage was kept secret; defendant then supposed it to be invalid. Plaintiff had no knowledge of it until the fall of 1873, and defendant knew that plaintiff believed him to be unmarried. In an action to rescind the sale and conveyance, *held*, that defendant's belief in the invalidity of the marriage did not justify his omission to disclose the fact to plaintiff, as if void, or if it could be annulled, the fact of the formal marriage would be a cloud on title; that, therefore, a finding of fraud was justified, and on the discovery thereof plaintiff was entitled to demand a rescission.

Plaintiff retained possession up to the time of the trial in September, 1877, and leased the premises, receiving the rents. At the time plaintiff discovered the defect in his title, he was advised that a suit brought by defendant for a divorce was pending. Plaintiff thereafter paid interest on mortgages given by him on the sale on defendant's assurance that the title would be fixed before the next interest became due. He also conveyed undivided interests in the premises to parties who had become jointly interested in the purchase. In the divorce suit both parties were found guilty of adultery and the complaint was dismissed. In December, 1874, for the purpose of testing the right of defendant's wife to claim dower, the plaintiff contracted to sell a portion of the premises; the contractor refused to take title on the ground of the outstanding dower right; upon an agreed case the question was presented and submitted to the court, and it was finally determined that the judgment in the divorce suit did not bar the dower right. (64 N. Y. 47.) In April, 1876, the interests so conveyed by plaintiff were reconveyed to him, and he thereupon tendered to defendant a reconveyance demanding a return of the purchase-money, defendant in reply promised to perfect the title. Immediately thereupon plaintiff commenced this action. Defendant thereafter procured and tendered a deed executed by his wife releasing her dower in the premises. *Held*, that assuming that in consequence of defendant's promises to perfect the title, the right to rescind was held in abeyance, notwithstanding plaintiff's acts as owner, plaintiff was

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bound, before bringing suit, to fix a reasonable time for perfecting the title giving defendant notice; and as it appeared that there had been no change in the value of the property after the commencement of the action, the tender of title was in equity a good answer to the claim for rescission.

(Argued December 21, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made July 1, 1879, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are set forth sufficiently in the opinion.

Charles Jones for appellant. Unless a party promptly disaffirms a contract on the discovery of the fraud, he will be deemed to have waived the fraud, and to have elected to abide by the contract. (*Wheaton* v. *Baker*, 14 Barb. 594; *Bruce* v. *Davenport*, 3 Keyes, 374; *Lamerson* v. *Marvin*, 8 Barb. 9; *Hunt, Adm'r*, v. *Singer*, 1 Daly, 209; *Benedict* v. *Nat. Bk. of Commonwealth*, 4 id. 171; *Masson* v. *Bovet*, 1 Denio, 69.) When time is once waived by the vendee or has ceased to be of the essence of the contract, the vendee must, in order to put the vendor in default, fix a day for completion at a reasonable time in the future and give the vendor notice. (*Myers, Ex'r*, v. *De Mier*, 52 N. Y. 647; *S. C.*, 4 Daly, 343; *Wiswall* v. *McGowan*, Hoffman Ch. 125, 139; *Harris* v. *Troup*, 8 Paige, 423; *Voorhis* v. *De Meyer*, 2 Barb. 37; *Richmond* v. *Foote*, 3 Lans. 244; Sugden on Vendors, 265.) If a purchaser, having a right to rescind upon the ground of fraudulent representations, continues to deal with the subject of the sale as owner after he is aware of the fraud, he will be held to have waived the right of action and cannot recover the purchase-money. (Sugden on Vendors, 335; *Campbell* v. *Fleming*, 1 Ad. & El. 40; *Moore* v. *Smedbury*, 8 Paige, 600; *Gale* v. *Nixon*, 6 Cow. 445; *Waters* v. *Train*, 9 Johns. 450.) The deed tendered to plaintiff before the contract was rescinded cured the defect in

the title, and by it the contract was completely performed. (*Voorhies* v. *De Meyer*, 2 Barb. 37; *Gale* v. *Nixon*, 6 Cow. 445; *Bebee* v. *Dowd*, 22 Barb. 255; *Tompkins* v. *Hyatt*, 28 N. Y. 347; *Coray* v. *Mathewson*, 7 Lans. 80; *Clanton* v. *Burgess*, 2 Dev. Ch. 13; *Davidson* v. *Moss*, 5 How. [Miss.] 673.) In order to rescind a contract on the ground of fraud, there must not only be a disaffirmance of it at the earliest practicable moment but there must be a return of all that has been received under it, and a restoration of the other party to the position in which he stood before the contract was made. (*Cobb* v. *Hatfield*, 46 N. Y. 533; *Masson* v. *Bovet*, 1 Denio, 69; *Sinclair* v. *Neill*, 1 Hun, 80; *Bedell* v. *Bedell*, 3 id. 580; *Lewis* v. *McMillan*, 41 Barb. 420; *Fisher* v. *Fredenhall*, 21 id. 28.) Evidence tending to show that defendant did not suppose or believe that he was legally married, or that Harriet Dietz was his lawful wife, was admissible as bearing upon his motive or intent, and as tending to show that his omission to state that he had a wife was not from any intent to deceive the plaintiff. (*McKoon* v. *Hunter*, 30 N. Y. 625; *Kerrains* v. *The People*, 60 id. 221; *Filkins* v. *The People*, 69 id. 101.)

Lucien Birdseye for respondent. The inchoate right of dower of Harriet, wife of defendant Dietz, was an incumbrance on the premises, which constituted a breach of the covenants as to title. (*Schiffer* v. *Prudden*, 7 J. & S. 167; affirmed, 64 N. Y. 47; *Hembling* v. *Ismay*, 3 J. & S. 35; *McCool* v. *Jacobus*, 7 Robt. 115.) The fraudulent suppression and concealment of a material fact necessary to be known in the transfer of the property was such a fraud on the part of Dietz as the law will punish by giving to the vendee the right to rescind the contract, and to be restored to all the loss by it. (*Wheelock* v. *Wheeler*, 34 Vt. 533; *Mason* v. *Crosby*, 1 Wood. & Min. 342; *Smith* v. *Babcock*, 2 id. 246; *Tapp* v. *Lee*, 3 Bos. & P. 371; *Central Railway Co. of Venezuela* v. *Kisch*, L. R., 2 App. Cas. 114; *Oakes* v. *Turquand*, id. 326; *Rawdon* v. *Blatchford*, 1 Sandf. Ch. 344; *Tregg* v. *Reid*, 5 Humph. 529; *Scott* v. *Bamer*, 2 Lans.

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557; *Smith* v. *Click*, 4 Humph. 186; *Prentiss* v. *Russ*, 16 Me. 30; *Pulsford* v. *Richards*, 17 Beav. 98; *Pusey* v. *Desbouverie*, 3 P. Wms. 315; *Bowles* v. *Stewart*, 1 Sch. & Lef. 249; *Brydges* v. *Branfil*, 12 Sim. 384; *Willis* v. *Willis*, 17 id 218; *Railton* v. *Matthews*, 10 Cl. & Fin. 934; *Farnam* v. *Brooks*, 9 Pick. 212; *Davidson* v. *Moss*, 4 How. [Miss.] 673; *Smolson* v. *Franklin*, 6 Munf. 210; *Laidlaw* v. *Organ*, 6 Wheat. 178; *Matthews* v. *Bliss*, 22 Pick. 48; *Kintzing* v. *Herran*, 8 B. Monr. 162; *Bowman* v. *Bates*, 2 Bibb, 47; *Arnot* v. *Biscoe*, 1 Ves. Sr. 95; *Martin* v. *Morgan*, 1 Brod. & Bing. 298 [5 E. C. L. 87]; *Turner* v. *Harvey*, 1 Jac. 169; 178; *Dolman* v. *Nokes*, 22 Beav. 402; *Davis* v. *Cooper*, 5 M. & C. 270; *Blake* v. *Mowatt*, 21 Beav. 603; *Cannock* v. *Chauncey*, 27 L. J. Ch. 57; *Ellard* v. *Llandaff*, 1 Ba. & Be. 241; *Jones* v. *Keene*, 2 M. & Rob. 349; *Walters* v. *Morgan*, 3 D., F. & J. 724; *Morgar* v. *Evans*, 3 Cl. & Fin. 205; *Burke* v. *Prior*, 15 Ir. Ch. 106; *Hill* v. *Gray*, 1 Starkie, 434 [2 E. C. L. 459]; *Mellish* v. *Motteux*, Peake, 156; *Smith* v. *Harrison*, 26 L. J. Ch. 412; *Edwards* v. *M'Cleary*, 2 Sw. 287; *Flight* v. *Barton*, 3 M. & K. 282; *Burnell* v. *Brown*, 1 J. & W. 172; *Gibson* v. *Spurrier*, Peak's Add. C. 50; *Seaman* v. *Vandrey*, 16 Ves. 390; *Prout* v. *Roberts*, 32 Ala. 427; *Halbert* v. *Grant*, 4 Mon. 580; *Ingraham* v. *Morgan*, 4 Humph. 66; *Steele* v. *Kniple*, 3 Ala. 353; *Carr* v. *Calahan*, 3 Litt. 216; *Kennedy* v. *Johnson*, 2 Bibb; *Campbell* v. *Whittingham*, 5 J. J. Marsh. 96; *Pollard* v. *Rogers*, 4 Call. 239; *Smolson* v. *Franklin*, 6 Munf. 210; *Davidson* v. *Moss*, 3 How. [Miss.] 673; *Turner* v. *Harvey*, 1 Jacob, 169; *Clark* v. *Baird*, 9 N. Y. 183, 196; *Durell* v. *Haley*, 1 Paige, 492; *Story* v. *Norwich & C. R. R. Co.*, 24 Conn. 94; *True* v. *Thomas*, 16 Me. 36; *Peter* v. *Wright*, 6 Ind. 183; *Smith* v. *Click*, 4 Humph. 186; *Keller* v. *Equitable Fire Ins. Co.*, 28 Ind. 170; *Turner* v. *Johnson*, 2 Cranch, 287; *Jenkins* v. *Simpson*, 14 Me. 364; *McAdams* v. *Oates*, 24 Mo. 223; *Hill* v. *Gray*, 1 Starkie, 434 [2 E. C. L. 459.) The vendor of land is responsible for material misrepresentations in respect to its location and qualities, made by his agent, without ex-

press authority, and in the absence of any actual knowledge by either the agent or the principal, whether the representations were true or false. (*Bennett* v. *Judson*, 21 N. Y. 238; *Elwell* v. *Chamberlain*, 31 id. 611, 619–620; *Hunter* v. *Hudson River I. & Mo. Co.*, 20 Barb. 493, 505–507; *New Brunswick, etc., Co.* v. *Conybeare*, 9 H. L. 711; *Western Bank of Scotland* v. *Addie*, L. R., 1 Sc. App. Cas. 159; *Oakes* v. *Turquand*, L. R., 2 App. Cas. 325; *Fitzimmons* v. *Joslin*, 21 Vt. 129; *Crocker* v. *Lewis*, 3 Sumner, 8; *Veazie* v. *Williams*, 8 How. [U. S.] 124; *Bowers* v. *Johnson*, 10 Sm. & Mar. 169; *Hunt* v. *Moore*, 2 Barr, 105; *Franklyn* v. *Elzell*, 1 Sneed, 497; *Udell* v. *Atherton*, 7 H. & N. 184; *Ex parte Ginger*, 5 Irish Ch. 174; *Barwick* v. *English J. S. B'k*, L. R., 2 Exch. 265; *Archbold* v. *Lord Houth*, L. R., 2 Irish Ch. L. 608; *Solomon* v. *Honeywood*, 12 Wend. 572; *Bristow* v. *Whitmore*, 9 H. L. 418; *Ex parte Ginger*, 5 Ir. Ch. 174; *Reynell* v. *Sprye*, 1 D., M. & G. 683; *Hough* v. *Richardson*, 3 Story, 689; *Henderson* v. *Railroad Co.*, 17 Tex. 560; *Crump* v. *U. S. Mining Co.*, 7 Gratt. 352; *Hunt* v. *Moore*, 2 Barr, 105; *Fitzimmons* v. *Joslin*, 21 Vt. 129; *Wheelton* v. *Hardisty*, 8 E. & B. 270; *National Ex. Co.* v. *Drew*, 2 Macq. 108, 144, 146; *Bartlett* v. *Salmon*, 6 D., M. & G. 39; *Barwick* v. *English J. S. Bk.*, L. R., 2 Exch. 262; *Bristow* v. *Whitmore*, 9 H. L. 418.) Plaintiff's right to rescind the contract was perfect when this suit was brought. (*Boyce* v. *Grundy*, 3 Peters, 210; *Davidson* v. *Moss*, 5 How. [Miss.] 673; *Hunt* v. *McConnel*, 1 Mon. 222; *Wycliffe* v. *Lee*, 6 B. Monr. 543; *Evans* v. *Bolling*, 5 Ala. 550; *Ayres* v. *Mitchell*, 3 Sm. & Mar. 683; *Woods* v. *North*, 6 Humph. 309 *English* v. *Banwood*, 25 Miss. 167; *Prout* v. *Roberts*, 32 Ala. 427; *Moreland* v. *Atchinson*, 19 Tex. 303; *Rawlins* v. *Wickham*, 3 D. & J. 322; *Bacon* v. *Bronson*, 7 Johns. Ch. 194; *Bean* v. *Herrick*, 12 Me. 262; *Pollard* v. *Rogers*, 4 Call, 239; *Campbell* v. *Whittingham*, 5 J. J. Marshall, 96; *Edwards* v. *M'Cleary*, Cooper, 308, 312; 2 Sw. 287; *Berry* v. *Armistead*, 2 Kean, 221; *Lovell* v. *Hicks*, 2 Y. & C. 46; *Pulsford* v. *Richards*, 17 Beav. 87, 96; *Bell's Case*, 22 id. 35; *Ayres'*

Case, 25 id. 515; *Slim* v. *Croucher*, 1 D., F. & J. 518; *Burrows* v. *Lock*, 10 Ves. 475; *Att'y-Gen.* v. *Cox*, 3 H. L. 240; *Ellis* v. *Coleman*, 25 Beav. 673; *Young* v. *Harris*, 3 Ala. 108; *Coffee* v. *Newsom*, 2 Kelly, 442; *Hoster* v. *Gersett*, 29 Ala. 393; *Garner* v. *Leorett*, 32 id. 410; *Gatting* v. *Newell*, 9 Ind. 372.) The tender by the plaintiff to the defendant, on April 25, 1876, of the deed carried with it a tender of the possession of the lands in question and was a sufficient transfer or offer to transfer the possession thereof. (*Young* v. *Harris*, 2 Ala. 108; *Coffee* v. *Newsom*, 2 Kelly, 442; *Hoster* v. *Gersett*, 29 Ala. 393; *Garner* v. *Leorett*, 32 id. 410.) Dietz's tender of a deed releasing his wife's dower, after the lapse of more than four and a half years from the time when the title should have been perfected, and of more than half a year after the commencement of this suit, was not a valid or sufficient one and cannot defeat the action. (*Gale* v. *Archer*, 42 Barb. 320.)

ANDREWS, J. This action was commenced on the 25th of April, 1876, to rescind a conveyance executed May 10, 1872, by the defendant to the plaintiff of certain lots in the city of New York, and to compel the defendant to restore $12,500 received by him from the plaintiff on the sale, and to cancel and surrender three bonds and mortgages amounting in the aggregate to $37,500, executed by the plaintiff to the defendant to secure the unpaid purchase-price of the land conveyed.

The conveyance sought to be rescinded was made in execution of a written contract of sale between the parties, made on the 8th of March, 1872, by which the defendant agreed to convey the premises described on the terms stated in the contract by a deed with covenants of warranty, free and clear from all incumbrances. The plaintiff's claim for relief is based upon the allegation that at the time of the execution of the contract and the delivery of the deed the defendant fraudulently suppressed the fact that he had a wife living, whose release of dower was necessary to convey to the plaintiff a perfect title.

In respect to the alleged fraud, it was shown that the defendant's first wife died in October, 1869. In Septem-

ber, 1871, he was married at Jersey City to his present wife, Harriet Dietz, at the house of the clergyman who performed the marriage ceremony, no witness being present except the clergyman's wife. The marriage was kept secret. The defendant provided for the support and maintenance of his wife after the marriage, but they resided at different places in the city of New York until June, 1872, and from the time of the marriage until that time they did not cohabit as man and wife. During this period the contract and conveyance in question was made. The plaintiff and defendant were friends, and during the life of the defendant's first wife had business transactions together. The plaintiff knew of the death of the defendant's first wife, soon after it occurred, but he had no knowledge of the subsequent marriage until the fall of 1873. The defendant stated to the plaintiff that he desired to go to Europe, and assigned this as the reason for wishing to sell the property. He did not inform the plaintiff that he had married again, and the plaintiff made no inquiry of the defendant upon the subject. The attorney of the plaintiff inquired of the defendant's broker, and was informed by him that the defendant was unmarried, and he made inquiries of persons whom he supposed would know, and received the same information. The death of the defendant's first wife was alluded to in conversations between the parties subsequent to her death. The defendant spoke of her loss and of his loneliness in consequence. The plaintiff testifies that the last conversation between them on this subject occurred about six months prior to the execution of the contract of March, 1872, a time anterior to the second marriage. The defendant was examined on the trial as a witness on his own behalf, and was asked by his counsel in respect to the circumstances under which he became acquainted with his present wife, whether he was informed by her or any other person that she was a married woman; what induced him to consent to the performance of the marriage ceremony, and whether when he entered into the contract with the plaintiff he supposed the said Harriet was his lawful wife. These questions were objected to

by the plaintiff's counsel, and the objections were sustained, and the defendant was not permitted to answer. He did state, however, without objection, that in omitting to state the fact of the second marriage he had no intention to deceive the plaintiff. The trial judge found as a fact that the defendant knew that the plaintiff believed him to be unmarried, and that in suppressing the fact of his marriage he was guilty of a willful fraud, but he further found "that from the time the defendant became convinced that there was a probability that he was legally married" up to the 6th day of November, 1876, he was constantly endeavoring to free the property from the dower right of his wife. This latter finding implies that the defendant, when he entered into the contract of March 8, 1872, supposed that the marriage with his present wife was for some reason invalid, but we concur in the conclusion of the trial court that this did not justify the defendant in omitting to disclose to the plaintiff that a marriage in form had been consummated, or relieve him from the charge of fraud. He knew that the plaintiff was dealing with him upon the assumption that he was unmarried. Even if the second marriage was void, or might for any reason have been annulled, he was in duty bound to disclose to the plaintiff the circumstances of the situation. If in fact the marriage was legal, the plaintiff could not acquire a perfect title to the land by a deed executed by the defendant alone, and if void, the fact of the formal marriage would be a cloud upon the title, and the defendant could not in justice cast upon the plaintiff the risk and burden of establishing its invalidity. We are, therefore, of opinion that the plaintiff was entitled, on discovery of the fraud, to demand a rescission of the sale and conveyance, and the restoration of the money and securities received by the defendant.

But a party entitled to rescind a contract for fraud may deprive himself of this remedy by acquiescence; or where the transaction is a sale of property, by his dealing with the property as owner after the discovery of the fraud. A party claiming to rescind a contract for fraud must act promptly on dis-

covery of the fraud, and restore, or offer to restore, to the other party what he has received under it. He cannot thereafter deal with the other party on the footing of an existing contract, or with the property acquired under it as his own. He has an election of legal remedies; to sue for damages, or to be reinstated in the position in which he was before the contract was consummated. The remedies are not, however, concurrent, but are inconsistent, and the adoption of one necessarily excludes the other. So when he has made an election, he must abide by it. (*Masson* v. *Bovet*, 1 Den. 69; *Cobb* v. *Hatfield*, 46 N. Y. 533; *Lawrence* v. *Dale*, 3 Johns. Ch. 23; *Tanner* v. *Smith*, 10 Sim. 411; *Ayres* v. *Mitchell*, 3 S. & M. 693; *Vigers* v. *Pike*, 8 Cl. & Fin. 562.) In *Vigers* v. *Pike*, which was a bill filed, in one of its aspects to rescind a transaction in respect to mining lands on the ground of fraudulent representations as to incumbrances and the extent of minerals on the land, Lord COTTINGHAM said: "In a case dependent upon misrepresentation as to the nature and value of the thing purchased, the defendant cannot adduce more conclusive evidence, or raise a more effectual bar to the plaintiff's case, than by showing that the plaintiff was from the beginning cognizant of all the matters complained of, or after full information continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines;" and he further says: "The doctrine of carrying equities by acquiescence I consider to be one of the most important to be attended to." In conformity with the general doctrine that a party cannot rescind while retaining the fruits of the contract, it has been frequently decided that a purchaser of real property must surrender possession acquired under the contract, before he can maintain an action for its rescission (*Gale* v. *Nixon*, 6 Cow. 445; *More* v. *Smedburgh*, 8 Paige, 600; *Tompkins* v. *Hyatt*, 28 N. Y. 347); and where fraud is claimed, continuance in possession, after discovery of the fraud, is evidence of an intent to abide by the contract.

It is insisted by the counsel for the defendant that the facts proved and found bar the plaintiff from maintaining this action

for rescission upon the principles to which we have referred. It was found that the plaintiff, from the time of the conveyance, has had uninterrupted possession of the premises, and from the 19th of May, 1872, down to the time of trial, in September, 1877, has leased the land and received in rents an amount exceeding $2,000. In March, 1873, the defendant commenced an action against his wife for divorce, on the ground of adultery. The plaintiff was informed, in September following, of the existence of this suit, and then ascertained the defect in his title. In November of the same year the defendant called upon the plaintiff for payment of six months' interest due on the mortgages. The plaintiff then spoke to the defendant in respect to the defect in the title, and the defendant replied that he need not be afraid about that; that a woman was trying to blackmail him, and he would have it fixed before the next interest became due. The plaintiff then, or a few days after, paid the interest to November 1, 1873. About this time he was offered $25,000 for a part of the property, and he testified that he considered the rest worth $30,000. The consideration of his purchase was $50,000. The plaintiff, on the 8th day of December, 1873, conveyed an undivided three-eighths part of the land to one Raynor, and an undivided one-eighth part to one Morris, subject to the payment of proportionate parts of the mortgages executed by him to the defendant. The grantees in these conveyances had become jointly interested with the plaintiff in the purchase, and the conveyances were made to vest in them their respective interests, but they were not parties to the contract with the defendant, and, so far as appears, he had no knowledge that they were concerned in the purchase. The defendant's wife in her answer, in the divorce suit, set up recriminatory charges of adultery against her husband. The proofs were taken before a referee who found that both parties had been guilty of adultery, and in July, 1874, judgment was entered, dismissing the complaint, and granting no relief to either party. The plaintiff and his attorney were advised of the progress of the divorce suit, and it is clear, upon the evidence, that both of the parties to this action looked to a favora-

ble issue of that suit as a means of relieving the plaintiff's title from embarrassment. In December, 1874, after the termination of the divorce suit, the attorneys for the defendant entertaining the opinion that the finding and adjudication in that action that the defendant's wife was guilty of adultery was a bar to any claim on her part, of dower in the premises, although no divorce had been decreed, proposed to the plaintiff's attorneys that the plaintiff should enter into a contract to sell a part of the land, and on the purchaser refusing to take the title on the ground of the outstanding dower right of the defendant's wife, to present to the court, upon an agreed case, the question whether the judgment in the divorce suit barred her of her dower, the expenses of the litigation being borne by the defendant. This proposition was assented to by the plaintiff, and it resulted in the case of *Schiffer* v. *Pruden* (reported in this court in 64 N. Y. 47). The case as agreed set out a contract for the sale by the plaintiff to Pruden of a specific parcel of the land; that the premises were conveyed to Schiffer by Dietz, by the deed now in controversy; the marriage of the defendant to his present wife; the proceedings and judgment in the divorce suit; the claim on the one side that the conviction of the defendant's wife of adultery in that suit barred her dower, and an adverse claim on the other, and concluded by submitting that question to the court for its decision. The statement was signed by the parties, and each verified it to the effect that the controversy was real, and that the proceeding was taken in good faith to determine the rights of the parties. The final decision in this court was made January 25, 1876, adjudging that the judgment in the divorce suit did not bar the defendant's wife of her dower. On the 20th of April, 1876, the executors of Raynor and Morris reconveyed to the plaintiff the interests in the land conveyed by the plaintiff to their respective testators, and on the 25th day of April, 1876, nearly four years after the conveyance now sought to be rescinded, and two years and a half after the discovery of the fraud, the plaintiff tendered to the defendant a reconveyance of the land, and demanded that he execute satisfaction-pieces of

these mortgages and pay him $22,452$60, the amount of the purchase-money, taxes, etc., paid by the plaintiff, with interest thereon, giving no credit for the rent received. The defendant, in reply to the demand, said that he would perfect the title and see his lawyer on the subject. The plaintiff thereupon immediately served the summons and complaint in this action. After the suit was commenced, and on the 4th day of May, 1876, the plaintiff made a general assignment to one Jacobs of all his real and personal estate, for the benefit of creditors. While the suit was pending, and on the 6th day of November, 1876, the defendant tendered to the plaintiff a deed, in due form, executed and acknowledged by his wife, releasing her dower in the premises, and on the same day tendered a similar deed to the assignee, and a supplemental answer was served setting up the fact.

We are of opinion, upon the case presented, that the plaintiff was not entitled to judgment rescinding the conveyance and transaction in question. The evidence justifies the inference that the property embraced in the defendant's deed was purchased by the plaintiff with a view to a resale, and that this was understood by both parties. The plaintiff, when he discovered the fraud, had the right to demand a rescission of the contract, and if he had acted promptly, and the defendant had resisted a rescission, and meanwhile the property had depreciated in value, a court of equity would not afterward have compelled him to have accepted a good title, or at least not without awarding him compensation. But the plaintiff did not rescind the contract and was in no position to rescind it after his conveyances to Raynor and Morris in December, 1873, until the 20th of April, 1876. The evidence tends to show that, when he discovered the fraud, the property was advancing in value, and that, at that time, it was his interest to have the title perfected, and not to have the conveyance annulled. The defendant repeatedly promised to perfect the title or take back the property, and it is evident that from the time the question first arose between the parties they were co-operating in good faith for the purpose

of extricating the title from the embarrassment which attended it. But during the whole time the plaintiff dealt with the property as owner. In November, 1873, he paid interest on the mortgages. He conveyed to Raynor and Morris their portions under his agreement with them. He contracted to sell one of the lots to Pruden, and then joined with him in submitting the question of his title on an agreed case, and the plaintiff retained possession and received the rents of the premises down to the time of trial.

Assuming that by reason of the assurances of the defendant the right to rescind, notwithstanding these acts of affirmance, was held in abeyance, and might thereafter be exercised unless the defendant perfected the title, we are of opinion that in analogy to the rule in actions for specific performance, when performance at the time has been waived, or is not of the essence of the contract, the plaintiff was bound, before bringing his action, to fix a reasonable time in the future for perfecting the title, giving the defendant notice. (*Harris* v. *Troup*, 8 Paige, 423; *Myers* v. *DeMier*, 52 N. Y. 647.) And in accordance with the general rule, that it is sufficient that the party is able to make his title before decree, provided no change of circumstances has occurred, we are of opinion that the tender of the title on the 6th of November, 1876, was in equity a good answer to the claim for rescission. (*Davidson* v. *Moss*, 5 How. [Miss.] 683; *Clinton* v. *Burges*, 2 Dev. Eq. 13; *Gaunt* v. *Macomb*, 6 Call, 368; 1 Story's Eq., § 777.) It appeared that there had been no change in the value of the property from the time of the commencement of the action, and the prior depreciation, while it may entail a loss upon the plaintiff if he is compelled to stand by his bargain, furnishes we think no ground, under the circumstances of this case, for shifting it upon the defendant. We are of opinion, therefore, that the judgment in this case rescinding *in toto* the transaction in question must be reversed. But if it should be found on the new trial that it was the understanding of the parties that interest should not run on the mortgages from the payment of the last interest in November, 1873, until the title should

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be perfected, we are not prepared to say that relief might not be granted to the extent of enforcing that understanding by the judgment in the action.

The judgment should be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

GIDEON G. STEPHENS, Respondent, *v.* SAMUEL H. FOX, Appellant.

In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act (§ 10, chap. 140, Laws of 1850, as amended by chap. 282, Laws of 1854), making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's *status* as a creditor and of the amount due him.

The effect of said provision is not to impose any penalty or original liability upon the stockholder, but simply to confer upon the creditor of the corporation a right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription. The creditor claims through the corporation, and if he shows that he is a creditor, by evidence binding and conclusive against it, the evidence is competent against the stockholder.

Miller v. *White* (50 N. Y. 137), *McMahon* v. *Macy* (51 id. 155), distinguished.

In such an action, on trial before a referee, after the case was closed it was reopened by order of the court for the sole purpose of allowing defendant to put in evidence certain exhibits and records; on the rehearing, defendant offered oral evidence to sustain a counter-claim. *Held*, that it was properly excluded.

(Argued November 16, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made at the April term, 1879, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 17 Hun, 435.)

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This action was brought under the general railroad act by plaintiff, as assignee of a judgment against the New York and Oswego Midland Railroad Company, against defendant, as a stockholder of said company, to recover an amount alleged to be unpaid upon his stock.

To prove the indebtedness of the corporation, the plaintiff offered in evidence the record of the judgment. This was objected to, and received under objection.

Defendant set up in his answer, as a counter-claim, an alleged indebtedness of the company to him. After judgment had been entered in the case on the report of the referee, defendant obtained an order opening the judgment, and sending the case back to the referee to enable the defendant "to put in his exhibits and records." Upon the rehearing before the referee, defendant offered oral evidence to sustain his counter-claim; this was objected to on the ground that the order did not authorize such testimony. The objection was sustained, and defendant's counsel duly excepted.

H. J. Cookingham for appellant. A judgment is not a debt. It is simply evidence of a debt, and only that as between parties and privies. (Burrill's L. D., "Judgment;" Webster's Dictionary, "Judgment;" *Monroe* v. *Upton*, 50 N. Y. 593.) The judgment of plaintiff's assignors against the company was neither conclusive nor *prima facie* evidence of a debt against said company, as between this plaintiff and a stockholder. (*Miller* v. *White*, 50 N. Y. 137; *Moss* v. *McCullough*, 5 Hill, 131; *Strong* v. *Wheaton*, 38 Barb. 616; *McMahon* v. *Macy*, 51 N. Y. 155; *Conant* v. *Van Schaick*, 24 Barb. 87; 1 Phil. on Ev. 333; 1 Greenl. on Ev., § 522; Burrill's L. D., "Privies;" 1 Greenl. on Ev., § 189; Webster's Dictionary, "Privy.") The provision for the return of execution against the company does not apply to suits brought under section 10 of chapter 282 of Laws of 1854. (*McMahon* v. *Macy*, 51 N. Y. 155, 160; *Ericsson* v. *Brown*, 38 Barb. 390; *Moss* v. *McCullough*, 7 id. 279; *Whithead* v. *Allen*, 28 id. 661.) The debt due from the defendant to the company,

if any, was a simple contract debt, and no more subject to the lien of the judgment against the company than would have been any other debt due the company from a party not a stockholder. (*Sanger* v. *Upton*, 91 U. S. 56; *Webster* v. *Upton*, id. 65; *Ogilvie* v. *The Knox Ins. Co.*, 22 How. [U. S.] 380.) The recovery of the judgment, the issuing of the execution and the return thereof was a useless proceeding in no way connected with the plaintiff's right to bring this suit. (*McMahon* v. *Macy*, 51 N. Y. 155.)

William H. Bright for respondent. Defendant's subscription for stock and his participation as a stockholder in the election of directors constitute him a stockholder. (*Spear* v. *Crawford*, 14 Wend. 20; *Buffalo R. R. Co.* v. *Dudley*, 14 N. Y. 337; *Lathrop* v. *Kneeland*, 46 Barb. 432; *Perkins* v. *Hatch*, 4 Hun, 137.) The judgment is itself a debt. (*Sayer* v. *Rustin*, 3 Wend. 496; Jacob's Law Dic., "Debt;" Bouvier's Law Dic., "Debt;" Tomlin's Law Dic., "Debt;" Chitty's Pr. 108, 109; *Anderson* v. *Murray*, 9 Abb. Pr. 8; *Taylor* v. *Root*, 3 Keyes, 333, 334; *McMahon* v. *Macy*, 51 N. Y. 155, 160.) Plaintiff's judgment is competent and conclusive evidence to prove the plaintiff to be a creditor of the railroad company, and establishes a debt and liability within the meaning of the statute. (*Hastings* v. *Drew*, 76 N. Y. 9; *Sayony* v. *Dubois*, 3 Sandf. Ch. 466; *Sanger* v. *Upton*, 91 U. S. 56; *Ogilvie* v. *Knox Ins. Co.*, 22 How. [U. S.] 308; *Stephens* v. *Fox*, 17 Hun, 435; *Mills* v. *Stewart*, 41 N. Y. 384, 390; *Rankin* v. *Elliott*, 16 id. 377–380; *Mann* v. *R. R. Co.*, 3 id. 415; *Morgan* v. *R. R. Co.*, 10 Paige, 290; *Bartlett* v. *Drew*, 57 N. Y. 587; *Webster* v. *Upton*, 91 U. S. 65; *Upton* v. *Tribilcock*, id. 45; *Nathan* v. *Whitlock*, 9 Paige, 152; *Burr* v. *Wilcox*, 22 N. Y. 551, 556; *Henry* v. *R. R. Co. et al.*, 17 Ohio, 187; *Hastings* v. *Drew*, 76 N. Y. 9; *Gibson* v. *Haggerty*, 37 id. 555; *Loraher* v. *Mayor, etc.*, 7 Abb. 248; *Ballston Bank* v. *Marine Bank*, 18 Wis. 490; *Baker* v. *Kenworthy*, 41 N. Y. 215.) A debt contracted by the agents or trustees of the company renders the stockholders personally

liable, and a judgment against the corporation therefor is binding and conclusive on the stockholders individually, to the extent of their respective shares, and whatever is a debt against the company is now, by force of the statute, a debt against them; and if the company itself was concluded the stockholders are equally concluded. (Angell & Ames on Corporations, § 615; *Slee* v. *Bloom*, 20 Johns. 668, 682, 684; *Miller* v. *White*, 50 N. Y. 137, 142; *Moss* v. *Oakley*, 2 Hill, 265; *Moss* v. *McCullough*, 7 Barb. 279; *Moss* v. *Averell*, 10 N. Y. 452.) In actions under the various statutes making officers and trustees of certain corporations liable for the corporate debts, because of their own or others' fault, fraud or negligence, the judgment against the company is no evidence of the debt, and has no application to this case. (*Hastings* v. *Drew*, 76 N. Y. 9; *Stephens* v. *Fox*, 17 Hun, 435.)

RAPALLO, J. This action is based upon section 10 of the general railroad act (chap. 140 of the Laws of 1850, as amended by chap. 282 of the Laws of 1854), which provides, that "each stockholder of any company formed under this act shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company." The only material question brought up on this appeal is whether, in an action against a stockholder to enforce this liability, a judgment recovered against the company is competent evidence of the plaintiff's status as a creditor of the company and of the amount due him.

The effect of section 10 is not to impose any penalty upon the stockholder, or any original liability, but simply to confer upon the creditor of the corporation the right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription to the capital stock. (*Mills* v. *Stewart*, 41 N. Y. 389.) The liability of the stockholder is not created or enlarged by the statute. It rests

upon his contract with the corporation, and the creditor is simply subrogated to the claim of the corporation against its debtor, in case he avails himself of his right under the statute to pursue the stockholder as such debtor to the corporation. A payment by the stockholder to the creditor, upon a recovery by him under the statute, will discharge the stockholder *pro tanto* from his indebtedness to the corporation. The creditor thus claims through the corporation, and to entitle him to this statutory subrogation or transfer, he need only show that he is a creditor. If he shows this fact by evidence which is binding and conclusive against the corporation, such evidence should be competent against the stockholder to establish the title of the creditor to succeed to the rights of the corporation. A judgment against the corporation being the highest evidence against it, should be as effectual to pass its title to the fund in question as a deed or any other form of transfer. The cases of *Miller* v. *White* (50 N. Y. 137) and *McMahon* v. *Macy* (51 id. 155) depend upon an entirely different principle. In those cases the defendant was not pursued as a debtor to the corporation, or for any pre-existing liability of his own, but upon an original liability created by the statute, and it was not in the power of the corporation to admit away his case, or suffer a recovery which should be binding upon him and create, as against him, a liability to which he was not previously subject. The present case depends upon the same principle as *Hastings* v. *Drew* (76 N. Y. 9), and other cases of actions by creditors against the debtors of their debtors, or for the recovery of assets of such debtor. In all such cases a judgment recovered by the plaintiff against his debtor is evidence of the right of the plaintiff to pursue the debtors or assets of the judgment debtor.

The exceptions to the exclusion of evidence of the defendant's counter-claim cannot be sustained. Before this evidence was offered the case had been closed, and it was reopened for the sole purpose of allowing the defendant to put in evidence certain exhibits and records. The defendant was not entitled,

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under this order, to go into a new defense and put in oral evidence. We find no good exception in the case.

The judgment should be affirmed.

All concur.

Judgment affirmed.

DAVID RISLEY, Respondent, *v.* THE PHENIX BANK OF THE CITY OF NEW YORK, Appellant.

A check is a bill of exchange within the statute (1 R. S. 768, § 6), declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance is in writing.

A verbal promise by a bank therefore to pay a check does not create a cause of action thereon.

An assignment of an account may be made by oral agreement, without writing, or any written statement of the claim assigned; and, if founded on a valid consideration, vests in the assignee a right to proceed in his own name for the collection of the debt.

So, also, an oral assignment for a valid consideration of a portion of a debt is valid.

Where, concurrently with the giving of a check for a portion of the amount standing to the credit of the drawer upon the books of defendant, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and receive the portion of the debt assigned, *held*, that the check was not the contract between the parties, and so did not render oral evidence of the agreement inadmissible; and that the parol assignment, was sufficient to vest in the plaintiff a title to the portion of the debt assigned.

Plaintiff presented the check, and demanded payment, January 4, 1865, notifying defendant that so much of the claim of the drawer as was represented by the check had been transferred to him; defendant's president promised to pay on presentation by some person known to the bank. On the next day when the check was again presented, defendant refused to pay, on the ground that on the morning of that day the debt had been seized by the United States, in pursuance of proceedings instituted on that day, under the confiscation acts of Congress. These proceedings were set up as a defense, and on the trial defendant, to sustain the defense, offered in evidence the record of a District Court of the United States, showing that the deposit to the credit of the drawer was attached in proceedings against the estate, property, etc., of the bank

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of G. (the drawer), on deposit with the defendant on January 5, 1865, and that defendant paid over to the marshal, in pursuance of a decree of said court in such proceedings, the whole amount of the credit. The assignment to plaintiff was made in May, 1861, before the passage of the confiscation acts. *Held*, that the record constituted no defense, and was properly excluded; that if notice to defendant was necessary to complete plaintiff's title, sufficient notice was given the day prior to the seizure; that the plaintiff was not concluded by the adjudication of the District Court to the effect that the property seized belonged to the bank of G.; also that the District Court acquired no jurisdiction under said acts to proceed for the forfeiture of a debt owing to a corporation.

Proceedings under the confiscation acts of Congress, while in the nature of proceedings *in rem*, operate only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture does not divest or affect the title of third persons originating prior to the seizure, or of the real owner not proceeded against.

The confiscation acts do not contemplate or authorize the confiscation of the property of a corporation.

Where a court, authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally.

(Argued November 16, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made November 6, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The amended complaint in this action contained three counts, the first two set forth a check, dated May 20, 1861, drawn by the Bank of Georgetown, South Carolina, upon defendant, payable to the order of plaintiff, for $10,000, alleged to have been delivered to plaintiff by the drawer for a good and valuable consideration, and to have been drawn against a deposit with defendant, largely exceeding that amount to the credit of the drawer. The third count alleged an indebtedness of defendant to said Bank of Georgetown, to the amount of $10,000, an assignment on the date aforesaid of that amount of said indebtedness to plaintiff, a demand and refusal to pay.

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The answer admitted that at the date of the check, and up to January 5, 1865, said Bank of Georgetown had on deposit with it more than $10,000, and alleged, among other things, that on that day the whole amount of said deposit "was duly seized and attached by the United States of America, and in and by virtue of certain proceedings duly had in the District Court of the United States for the Southern District of New York, said court having jurisdiction in the premises, a monition was duly issued, and the same was duly served on this defendant, by the United States marshal for the Southern District of New York, and thereupon such proceedings were duly had and taken in said court, in those proceedings which said court had jurisdiction thereof; that afterward, and on or about the 24th day of January, 1865, a certain decree of said court was duly given and made, and thereupon and on said day a duly authenticated copy thereof was duly served upon this defendant, and in pursuance of said decree on the said last-named day, the said defendant delivered to the said marshal * * * the whole sum then on deposit with said defendant to the credit of said Bank of Georgetown, and being the same moneys seized and attached as aforesaid."

The facts appearing upon the trial are sufficiently set forth in the opinion.

Samuel Hand for appellant. The draft or bank check declared on in this action is, to all intents and purposes, a bill of exchange. (*Harker* v. *Anderson*, 21 Wend. 372; *Boehm* v. *Sterling*, 7 T. R. 419–426; *Cruger* v. *Armstrong*, 3 Johns. Cas. 5; *Merchants' Bk.* v. *Spicer*, 6 Wend. 443, 445; *Murray* v. *Judah*, 6 Cow. 484, 490; *Pike* v. *Irwin*, 2 Sandf. 14; *Lunt* v. *Bk. of N. America*, 49 Barb. 221; *Chapman* v. *White*, 6 N. Y. 412; *Bellamy* v. *Majoribanks*, 8 Eng. L. & Eq. 523; *Schneider* v. *Irving Bk.*, 1 Daly, 500; *Duncan* v. *Berlin*, 60 N. Y. 151; *Atty.-Gen.* v. *Continental Life Ins. Co.*, 71 id. 330; 11 Hun, 484; 1 R. S. 768, § 6; *Luff* v. *Pope*, 5 Hill, 577; *Chapman* v. *White*, 6 N. Y. 412; *Blackiston* v. *Dudley*, 5 Den. 574; *Duncan* v. *Berlin*, 60 N. Y. 151; 11 Hun, 484;

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Rosenthal v. *Maston Bk.*, 21 A. L. J. 28; *Nat. Bk. of Brockville* v. *Second Nat. Bk. of Lafayette*, 22 id. 110.) The check in this case having been drawn on the general funds of the drawer in the hands of the drawee, and not on any particular deposit or fund, did not operate as an equitable assignment of the fund. (*Attorney-Gen'l* v. *Continental Life Ins. Co.*, 71 N. Y. 325; *Dykers* v. *Leather Manufacturers' Bk.*, 11 Paige, 613; *Schneider* v. *The Irving Bk.*, 1 Daly, 500.) Being drawn for a part of the fund only, whether on a general or particular fund, it did not amount to an assignment of that part, or give a lien as against the drawee, unless he consented to appropriation by an acceptance of the draft. (*Cowperthwaite* v. *Sheffield*, 1 Sandf. 416, 450.) Conversations prior to and contemporaneous with the execution of a written contract are merged in the written instrument, and this rule applies as well to notes, checks and bills of exchange as to other contracts. (*Johnson* v. *McIntosh*, 31 Barb. 267; *Burbank* v. *Beach*, 15 id. 326; *Payne* v. *Ladue*, 1 Hill, 116; *Ely* v. *Kilborn*, 5 Den. 514; *Brown* v. *Hull*, 1 id. 400; *Fitzhugh* v. *Runyon*, 8 Johns. 375; *Wells* v. *Baldwin*, 18 id. 45; *Erwin* v. *Saunders*, 1 Cow. 249; *Eaves* v. *Henderson*, 17 Wend. 190; *Gridley* v. *Dole*, 4 N. Y. 386; *Lewis* v. *Jore*, 7 Bosw. 366; *Montgomery Bk.* v. *Alb. City Bk.*, 8 Barb. 396; *Bk. of Albion* v. *Smith*, 27 id. 489; *Stevens* v. *Cooper*, 1 Johns. Ch. 425; Martin & Hill's Notes to Phil. Ev. 1467; 1 Phil. Ev. 561; 2 Wharton on Evidence, § 1058; *Attorney-Gen'l* v. *Continental Life Ins. Co.*, 71 N. Y. 331; *Mandeville* v. *Welsh*, 5 Wheat. 286; *Smith* v. *Jones*, 15 Johns. 229; *Guernsey* v. *Carver*, 8 Wend. 492; *Miller* v. *Covert*, 1 id. 487; 1 Pars. on Contracts, 223–224, *229, and cases; *Sexton* v. *Fleet*, 2 Hilt. 477; *Briggs* v. *Dorr*, 19 Johns. 96; *Rupp* v. *Blanchard*, 34 Barb. 629.) The alleged oral assignment was altogether inoperative as against the Phenix Bank, because the bank had no notice of the same. (1 Pars. on Contracts, *229, 230; *Stocks* v. *Dobson*, 19 Eng. Law and Eq. 97; *Jones* v. *Witter*, 13 Mass. 307; *Shuttleworth* v. *Bruce*, 7 Robt. 162; *Bishop* v. *Holcomb*, 10 Conn. 444; *Parks* v. *Innes*, 33 Barb. 37; *Field* v. *Mayor*, 6

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N. Y. 188.) The court below erred in excluding from the jury the confiscation proceedings and decree of confiscation in the District Court of the United States; the judgment of the District Court was a perfect defense to the defendant until reversed or modified on appeal. (*Grignon's Lessee* v. *Astor*, 2 How. [U. S.] 338; 2 Burrill's Law Dict. 113; 12 Stat. at Large, 319, 589; *Miller* v. *United States*, 11 Wall. 299; *Tyler* v. *Defrees*, id. 349; *Cooper* v. *Reynolds*, 10 id. 308; *The Confiscation Cases*, 20 id. 92; Stephens on Pleading, 292; *Pike* v. *Wassel*, 4 Otto, 712; Act of August 6, 1861, 12 Stat. at Large, 319; Act of July 17, 1862, id. 589; *Kelsey* v. *Beers*, 16 Abb. Pr. 228; *Kenpes' Lessee* v. *Kennedy*, 5 Cranch, 185; *Tobias* v. *Watkins*, 3 Pet. 193; *Chemung Canal Bk.* v. *Judson*, 8 N. Y. 254; *Elliott* v. *Peirsol et al.*, 1 Pet. 328, 340; *Buckman* v. *Coewell*, 1 N. Y. 507; Watson on Sheriffs, 53, 54, 55; 7 Law L.; *Gelston* v. *Hoyt*, 3 Wheat. 246; *Williams* v. *Armroyd*, 7 Cranch, 423; *Hudson* v. *Guestier*, 6 id. 281; 1 Greenleaf on Evidence, §§ 525, 543 [Red. ed]; *Grignon* v. *Astor*, 2 How. [U. S.] 319; *Cocke* v. *Halsey*, 16 Pet. 71; *Thompson* v. *Tolmie*, 2 id. 157; *Voorhies* v. *Bank of United States*, 10 id. 449; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 193; *Watson* v. *Burt*, 9 Hun, 470; *Wilcox* v. *Jackson*, 13 id. 511; *Union Ins. Co.* v. *United States*, 6 Wall. 763; *United States* v. *Stock of R. Co.*, 5 Blatchf. 231; *Wallach* v. *Van Riswick*, 2 Otto, 203; *Stevens* v. *Ins. Co.*, 41 N. Y. 149; *United States* v. *Amedy*, 11 Wheat. 392; *People* v. *May*, 27 Barb. 238; *Thornton* v. *Bank of Washington*, 3 Pet. 36; *Society* v. *Town of New Haven*, 8 Wheat. 464; U. S. Rev. Stat., § 1; *Railway Co.* v. *Whitton*, 13 Wall. [U. S.] 328; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Bement* v. *Wisner*, 1 C. [N. S.] 143; *Wheeler* v. *Dakin*, 12 How. Pr. 537; *Halstead* v. *Black*, 17 Abb. 227; *Miller* v. *The United States*, 11 Wall. 268.)

James E. Risley for respondent. Plaintiff was entitled to recover even though the decree of confiscation was valid because

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the assurance of defendant, when the check was presented for payment, that the drawer's signature was correct; that it still held the funds, and that the check was good and would be paid, rendered him liable for the amount. (*Farmers & Mechanics' Bk.* v. *B. & D. Bk.*, 16 N. Y. 125; *Cooke* v. *State Nat. Bk.*, 52 id. 96; *Marine Nat. Bk.* v. *Nat. City Bk.*, 59 id. 67; *Merchants' Bk.* v. *State Nat. Bk.*, 10 Wall. 604; *Barnes* v. *Ontario Bk.*, 19 N. Y. 152, 159; *Meads* v. *Merchants' Bk.*, 25 id. 143; *Irving Bk.* v. *Wetherald*, 36 id. 335; *Barnet* v. *Smith*, 10 Foster [N. H.], 256; *Epsy* v. *Bk. of Cincinnati*, 18 Wall. 604.) A good cause of action against the Phenix Bank is contained in the complaint and made out on the evidence as upon the assignment of a debt or demand. (*Chapman* v. *White*, 6 N. Y. 412; *Ætna Nat. Bk.* v. *Fourth Nat. Bk.*, 46 id. 82; *Prescott* v. *Hull*, 17 Johns. 284; *Ford* v. *Stuart*, 19 id. 342; *Waldron* v. *Baker*, 4 E. D. Smith, 440; 1 Parsons on Contracts [6th ed.], 228; Bliss' N. Y. Code, 248, note *d*; *Kessel* v. *Albetis*, 56 Barb. 362; *Hooker* v. *Eagle Bk.*, 30 N. Y. 83; *S. C.*, 11 Hun, 484.) The proceedings taken for forfeiture in the District Court were properly excluded, as that court had no authority to entertain them and they were void. (*U. S.* v. *Shares of Stock*, 5 Blatchf. 201; *Brown* v. *U. S.*, 8 Cranch, 110; *Planters' Bk.* v. *Union Bk.*, 16 Wall. 496; *Bell* v. *Dole*, 11 Johns. 172; *Story* v. *Stebbins*, 5 Cow. 210; *Myers* v. *Foster*, 6 id. 567; *Andrews* v. *U. S.*, 2 Story [C. C.], 202; *Ferrett* v. *Atwill*, 1 Blatchf. 151; *U. S.* v. 1,412 *Gall. Spts.*, 10 id. 428; *U. S.* v. *Morris*, 2 Bond, 23; *U. S.* v. *Clayton*, 2 Dillon, 219; *U. S.* v. *Huckabee*, 16 Wall. 431; *U. S.* v. *Sheldon*, 2 Wheat. 119; *U. S.* v. *Wiltberger*, 5 id. 76; *U. S.* v. *Ragsdale*, 1 Hempstead, 497; *Planters' Bk.* v. *Union Bk.*, 16 Wall. 496.) The proceedings in the District Court, for confiscation, were fatally defective and irregular, and the court did not have or acquire jurisdiction to pronounce a valid decree forfeiting the property of the Bank of Georgetown. This is so, notwithstanding such property may have been the lawful subject of confiscation. (*The Hoppet*, 7 Cranch, 389; *The Caroline*, id. 500;

The Charles, 1 Brock. 347; *The Mary Ann*, 8 Wheat. 380; 2 Parsons on Maritime Law, 681; *The Sarah*, 8 Wheat. 39; *Union Ins. Co.* v. *U. S.*, 6 Wall. 759; *Armstrong's Foundry*, id. 766; *U. S.* v. *Hart*, id. 770; *Confiscation Cases*, 7 Wall. 462; *Morris' Cotton*, 8 id. 511; *Ex parte Graham*, 10 id. 541; *U. S.* v. *Winchester*, 99 U. S. 372; *Thompson* v. *Whitman*, 18 Wall. 457; *Haggerty* v. *Wilber*, 16 Johns. 287; *Goll* v. *Hinton*, 8 Abb. 120; *Smith* v. *Orser*, 42 N. Y. 132; *U. S.* v. *Graff*, 4 Hun, 634. The record of the proceedings was wholly irrelevant and immaterial. (*Burbank* v. *Semmes*, 99 U. S. 138; *Conrad* v. *Waples*, 96 id. [6 Otto] 279.) Although it was in evidence that the inhabitants of South Carolina were engaged in insurrection in May, 1861, their character — rebels and insurrectionists — did not deprive them of the right to contract with, and sell to, each other. (*Conrad* v. *Waples*, 96 U. S. [6 Otto] 279; *Mitchell* v. *U. S.*, 21 Wall. 352.) Where a chose in action is assignable, it may be assigned in separate parcels to different persons, and either of the assignees may maintain an equitable action to recover the portion to him assigned. (*Field* v. *Mayor, etc.*, 6 N. Y. 179; *Cook* v. *Genesee Mut. Ins. Co.*, 8 How. 514; *Moor* v. *Trumpbour*, 5 Cow. 488; *Hooker* v. *Eagle Bk.*, 30 N. Y. 83; Code of Procedure, § 111; *Muir* v. *Schenck*, 3 Hill, 228; *Richardson* v. *Ainsworth*, 20 How. 521; *Ruckman* v. *Pitcher*, 20 N. Y. 9; *The Second Ave. R. R. Co.* v. *Coleman*, 24 Barb. 300.)

ANDREWS, J. The check drawn by the Bank of Georgetown on the defendant, having been drawn on the general deposit of the drawer in the hands of the drawee, in the ordinary form of a bank check, did not, of itself, operate as an equitable assignment to the payee, of the fund, to the amount of the check. The check was a bill of exchange, within the statute that no person shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing; and the defendant not having made a written acceptance of the check, no right of action thereon accrued to the plaintiff by reason

of the verbal promise to pay the check made by the defendant on its presentation. (1 R. S. 768, § 6; *Harker* v. *Anderson*, 21 Wend. 372; *Luff* v. *Pope*, 5 Hill, 413; *Chapman* v. *White*, 6 N. Y. 412; *Duncan* v. *Berlin*, 60 id. 153; *Atty.-Gen.* v. *The Continental Life Ins. Co.*, 71 id. 325.)

The court, on the trial, ruled in accordance with the settled doctrine upon this subject, that the plaintiff was not entitled to recover upon the cause of action founded upon the check and the verbal promise of payment. But the court further ruled, that he was entitled to recover upon the third cause of action, which alleged an assignment of $10,000 of the debt owing by the defendant to the Bank of Georgetown, made on the 20th day of May, 1861, the day on which the check was dated and delivered to the plaintiff, if the jury should find that concurrently with the giving of the check there was an oral agreement, for a valuable consideration, made between the Bank of Georgetown and the plaintiff, to assign to the latter $10,000 of its debt against the Phenix Bank. The court stated to the jury, that if the transaction between the plaintiff and the Bank of Georgetown was simply a purchase of the check or draft, the plaintiff could not maintain the action, and that the question for the jury to determine was, "whether there was, independent of the check, an agreement of assignment and purchase and sale of $10,000 of the debt from the Phenix Bank to the Bank of Georgetown;" and that if there was such an agreement, the plaintiff was entitled to recover.

The Phenix Bank, prior to May 20, 1861, was the correspondent in the city of New York of the Bank of Georgetown, a banking corporation located at Georgetown, South Carolina; and on that date there was on its books a credit to the Bank of Georgetown to the amount of about $18,000, derived from deposits and collections, which sum was then owing by the Phenix Bank to the Bank of Georgetown. The plaintiff was a resident of Georgetown, and had dealings with the Bank of Georgetown. He was examined on the trial, as a witness in his own behalf, and testified in substance that on the day when the check was dated, the president of the

bank stated to him that the bank had a claim of $17,000 or $18,000 against the Phenix Bank, and offered to sell it to the plaintiff, stating as a reason, that he was afraid it might be lost during the war, and that he was unwilling to carry the risk; that the plaintiff offered to purchase the claim at fifty cents on the dollar, which offer was declined, and the president then offered to sell it for Southern bank bills at par; that the plaintiff then offered, if the bank would divide the claim, to purchase $10,000 of it, upon the terms proposed, which offer was accepted, and the plaintiff thereupon paid the $10,000; that a question arose as to what kind of a transfer should be given, and the president of the bank said he would give the plaintiff an order on the Phenix Bank for the amount, and thereupon gave the plaintiff the check before referred to, and this completed the transaction between the plaintiff and the Bank of Georgetown.

The check was not presented to the Phenix Bank for payment until January 4, 1865. The plaintiff testifies that on that day he presented the check at the bank to the president, and told him he had called to collect it; that the president, after looking at the check, said it was good, and that it would be paid on presentation by some person known to the bank; that he thereupon stated to the defendant's president that the Bank of Georgetown had transferred to him so much of its claim against the defendant as was represented by the check. The next day the check was again presented by a person known to the defendant, and the bank then refused payment, on the ground that the debt had, on the morning of that day, been seized by the United States, as forfeited under the confiscation acts of Congress. The amount standing to the credit of the Bank of Georgetown, on the books of the Phenix Bank January 4, 1865, was $12,117.38. The credit existing May 20, 1861, had been reduced by checks charged against the account, drawn by the Bank of Georgetown, after that date, and paid by the Phenix Bank; but no new deposit had been made and the Phenix Bank had no lien upon or relation to the fund remaining in its hands January 4, 1865,

except as simple depositary of the Bank of Georgetown. The defendant denied in its answer the assignment alleged in the complaint, and sought to discredit the plaintiff's testimony in respect to the purchase from the Bank of Georgetown, by introducing his testimony on a former trial, in which he made no allusion to the negotiation for the purchase of the claim, to which he testified on this trial. The defendant also controverted the plaintiff's evidence upon the point of notice to the officers of the defendant, of the transfer to him by the Bank of Georgetown, of $10,000 of its claim. But the jury found for the plaintiff upon these controverted questions and their finding is conclusive upon this appeal.

It is claimed, however, that, admitting the truth of the plaintiff's narration of the transaction with the Bank of Georgetown, it did not, in law, constitute an assignment by the bank to the plaintiff of $10,000 of the debt against the defendant, for the reasons, *first*, that the contract actually made was reduced to writing, and is represented by the check, and that oral evidence was inadmissible to show that any thing else was contemplated by the parties, except the sale and purchase of a bill of exchange, with the ordinary incidents flowing from that transaction; *second*, that there was no delivery of any account, document or writing, showing the existence or character of the debt undertaken to be assigned; and *third*, that the alleged assignment only included a part of the general fund on deposit with the defendant to the credit of the Bank of Georgetown.

We are of opinion that neither of these objections is tenable. The relation between the Phenix Bank and the Bank of Georgetown was that of debtor and creditor. The order drawn by the Bank of Georgetown upon the Phenix Bank was not a contract between the parties to this action; and as between the plaintiff and the Bank of Georgetown, the giving of the order was equally consistent with the ordinary transaction of the purchase of a draft, or the assignment of the debt against the Phenix Bank, to the amount of the order, and the taking of the order as a convenient method of enabling the plaint-

iff to collect and receive the portion of the debt assigned. The fact that the plaintiff became the owner of the debt, by agreement between him and the Bank of Georgetown, made contemporaneously with the delivery of the check, imposed no new obligation upon the defendant. The Phenix Bank was not bound to give a written acceptance of the order. Nor could it be made liable upon the check without a written acceptance. It was bound, as it had always been, to account for the fund in its possession to the Bank of Georgetown or to its assignee, and pay it over on demand of the legal owner.

In respect to the claim that there was no delivery to the plaintiff, at the time of the alleged transfer, of any account or document showing the claim intended to be assigned, it is to be observed, that the claim of the Bank of Georgetown against the Phenix Bank rested in open account on the books of the respective banks. The chose in action assigned was not a note or bond or other written obligation, the retention of which by the alleged assignor would, in most cases, be strong if not conclusive evidence that the assignment had not been completed. But an assignment of an account may be made without writing or delivery of any written statement of the claim assigned, so as to vest in the assignee a right to proceed in his own name for the recovery of the debt, provided only that the assignment is founded on a valid consideration between the parties. In *Heath* v. *Hall* (4 Taunt. 327), Lord MANSFIELD said: "If two men agree for the sale of a debt, and one of them gives the other credit in his books for the price, that may be a very good assignment in equity; its resting in parol is no objection." In *Tibbits* v. *George* (5 Ad. & El. 107) a verbal assignment of a portion of a debt was held to be good. Lord DENMAN said: "None of the authorities which have been cited show that it is necessary that the assignment should be in writing in order to pass an equitable interest, although in very many cases there was a writing." In *Crocker* v. *Whitney* (10 Mass. 316), JACKSON, J., speaking of an assignment to the plaintiff of money of the assignor in the hands of the defendant, said: "But there appears to be no reason why it may not

be as well affected by a verbal request or assignment." And in *Dunn* v. *Snell* (15 Mass. 481) it was held, that the delivery of an execution was a good equitable assignment of a judgment; and PARKER, C. J., said: "It is not doubted that this debt, upon which this judgment was rendered, might have been assigned in writing without seal, or even, according to the decisions, without writing."

The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well-settled rule in this State. (*Taylor* v. *Bates*, 5 Cow. 376; *Wheeler* v. *Wheeler*, 9 id. 34; *Pattison* v. *Hull*, id. 747; *Field* v. *The Mayor*, 6 N. Y. 179.) The point was ruled in the same way by the court of King's Bench in *Tibbits* v. *George* (*supra*). The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action. (See note to *Morton* v. *Naylor*, 1 Hill, 585.)

We come, then, to the principal remaining question in the case, arising upon the exception of the defendant to the exclusion on the trial of the record of the District Court of the United States for the southern district of New York, offered to sustain the defense alleged in the answer that the deposit in the Phenix Bank to the credit of the Bank of Georgetown was on the 5th day of January, 1865, duly seized and attached in pursuance of proceedings instituted on that day by the United States, under the act of Congress approved August 6, 1861, entitled "An act to confiscate property used for insurrectionary purposes," and the subsequent act approved July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and that subsequently, on or about the 24th day of January, 1865, in pursuance of the decree of the court duly made the defendant paid over to the

marshal the sum of $12,117.38, the whole amount of the credit of the Bank of Georgetown with the Phenix Bank.

It appears by the record of the proceeding in the District Court, that on the 5th day of January, 1865, a *libel* of information was filed, by the attorney of the United States for the district in which the proceedings were instituted, "Against the estate, property, money, stocks, credits and effects, to wit: Against $15,000 (fifteen thousand dollars), more or less, belonging to the Bank of Georgetown, a corporation doing business in the State of South Carolina, which said $15,000 is now in cash, and is now on deposit in the Phenix Bank, a corporation doing business in the city of New York." The information — or libel of information, as it is called — alleges a seizure by the marshal on that day, by and under the authority of the president of the United States, and in obedience to the instructions of the attorney-general, and in pursuance of the acts of Congress before referred to, of "the estate and property, money, stocks, credits and effects aforesaid, to the end that the same may be confiscated, forfeited and condemned," as provided in said acts. The information then proceeds to set forth various causes of forfeiture under the acts of 1860 and 1862, viz.: *First*, that the Bank of Georgetown acquired the property seized with the intent specified in the act of 1861, and used and employed it with that intent; *second*, that the corporation, since the 17th day of July, 1862, acted as the fiscal agent of the Confederate government and of several of the States of the Confederacy, and accepted such agency from the several States after the date of the ordinances of secession of those States; *third*, that since the 17th of July, 1861, the Bank of Georgetown, while owning property in the State of New York, had given aid and comfort to the rebellion, in the ways and by the acts set forth in the information; *fourth*, that the corporation, after the passage of the act of July 17, 1862, being engaged in aiding and abetting the rebellion, did not, within sixty days after the proclamation of the president of July 25, 1862, cease therefrom. The information avers that by reason of the causes alleged, the "said property, estate and effects" were

liable to confiscation and condemnation, under the acts of Congress, and demands judgment sentencing it to be condemned as confiscated and forfeited to the United States. On the same day on which the information was filed, viz.: January 5, 1865, a monition, so called, was issued to the marshal, reciting the filing of an information against $15,000, more or less, belonging to the Bank of Georgetown, "which said $15,000 is now in cash, and is now on deposit in the Phenix Bank," and directing the marshal to attach the "said $15,000," and to give due notice to all persons claiming the same, or knowing or having any thing to say why the same should not be condemned, to appear before the court in which the proceedings were taken, on the 24th day of January, 1865, at an hour named, to interpose a claim for the same and make their allegations in that behalf. On the 24th of January the marshal made his return to the monition, that he had, on the 5th day of January, 1865, attached "$13,000, more or less, deposited in the Phenix Bank, belonging to the Bank of Georgetown," and had given due notice as required thereby. On the same day a decree was entered that "$12,117.38, belonging to the Bank of Georgetown, in the State of South Carolina, and now on deposit in the Phœnix Bank, in the city of New York, which said $12,117.38 has been heretofore seized by the marshal in this proceeding, be and the same is hereby condemned as forfeited to the United States," and directing a writ of *venditioni exponas* to issue, returnable February 14, 1865, and that upon the return thereof the marshal pay into the registry $12,117.38, to abide the further order of the court. The decree recites that it was made upon default, and the record does not show that any proofs were taken of the facts alleged in the information. The *venditioni exponas* was issued on the day the decree was entered, and on the 26th of January, two days thereafter, the marshal returned that he had collected from the Phenix Bank, $12,117.38, and had paid it to the clerk of the court. On the 27th day of January a decree distributing the fund collected was made, awarding it in equal parts to the United States and the informer.

Opinion of the Court, per ANDREWS, J.

We are of opinion that the record of the confiscation proceedings, if admitted in evidence, would have constituted no defense to the action. The claim of the plaintiff to the fund in question had its origin in an assignment from the Bank of Georgetown, made May 20, 1861, prior to the passage of either of the confiscation acts, under which the proceedings for forfeiture were taken; and if notice to the Phenix Bank was necessary to complete the title of the assignee, such notice, as the jury have found, was given to the bank January 4, 1865, the day prior to the seizure by the marshal. The decree of the District Court adjudges that the property seized was the property of the Bank of Georgetown, contrary to the fact as found by the verdict in this case. The question arises, whether the adjudication of the District Court concludes the plaintiff from contesting the fact that the property condemned was, at the time of the seizure and decree, the property of that corporation. If proceedings and judgment under the confiscation acts are strictly *in rem*, it would be difficult to deny the conclusiveness of the judgment in respect to every material fact adjudicated thereby. To such proceedings all persons are deemed to be parties, and persons claiming any right or interest hostile to the proceedings are bound to come in and assert such right or interest; and failing to do so, they are conclusively bound by the judgment. A judgment *in rem* operates upon the *status* of the subject-matter involved, and renders it what it declares it to be. Thus, the sentence of a court of admiralty, having jurisdiction, decreeing a ship to be a lawful prize, is conclusive as to every ground of fact upon which it proceeds, and until reversed on appeal, the facts adjudged are conclusively established thereby, as against the whole world. (*Bernardi* v. *Motteux*, Doug. 581; *Rose* v. *Himely*, 4 Cranch, 241; Broom's Leg. Max. 920; 2 Smith's Lead. Cases, 808, and cases cited.)

But as we understand the decisions of the Supreme Court of the United States in *Day* v. *Micou* (18 Wall. 156), and *Conrad* v. *Waples* (96 U. S. 279), confiscation proceedings under the acts of Congress referred to, while in the nature of

proceedings *in rem*, operate only to divest the title and interest of the party alleged to be the owner of the property seized, and as against whom the seizure is made, and that judgment of confiscation and forfeiture does not divest the title of third persons originating prior to the seizure, or of the real owner not proceeded against.

In *Day* v. *Micou*, it was held that the interest of a mortgagee under a mortgage executed in 1858 was not divested by proceedings under the confiscation act of July 17, 1862, against the owner of the land mortgaged and a sale pursuant to the judgment thereon. STRONG, J., in speaking for the majority of the court, after referring to the seventh section of the act, said: "What property is this thus brought within the jurisdiction of the District Court? Beyond doubt the property which had been seized, that is, the estate and property of the offending person, and no other. * * * It is true proceedings *in rem* were ordered to be instituted in the District Court, but the question remains, what was the *res* against which the proceedings were directed? The answer must be, that which was seized and brought within the jurisdiction of the court. A condemnation in a proceeding *in rem* does not necessarily exclude all claim to other interests than those which were seized. In admiralty cases and in revenue cases a condemnation and sale generally pass the entire title to the property condemned and sold. This is because the thing condemned is considered as the offender or the debtor, and is seized in entirety. But such is not the case in many proceedings which are *in rem*. Decrees of courts of probate or orphan courts directing sales for the payment of a decedent's debts or for distribution are proceedings *in rem*. So are sales under attachments or proceedings to foreclose a mortgage, *quasi* proceedings *in rem*, at least. But in none of these cases is any thing more sold than the estate of the decedent, or of the debtor or the mortgagor in the thing sold. The interests of others are not cut off or affected." The learned justice concludes as follows: "If then, as we hold, the property and estate of J. P. Benjamin was all that was seized, or all that could

be seized and condemned in these confiscation proceedings, those who held other interests in the land were not bound to come in and assert their claims. Their interests did not pass to the purchaser at the sale, and they remain unaffected by the decree of condemnation and the sale thereunder."

Conrad v. *Waples* was ejectment — the plaintiff claiming title under a deed executed by his father, Charles M. Conrad, May 6, 1862, of lands in the city of New Orleans. The defendant claimed title under a deed from the marshal of the United States, executed in March, 1865, upon a sale under a decree of the District Court, rendered in February of that year, condemning and forfeiting the property to the United States, as that of Charles M. Conrad, in proceedings under the confiscation act of July 17, 1862. The plaintiff and his father, when the plaintiff's deed was executed, were engaged in the rebellion, and so continued until the close of the war. The father was a member of the Confederate Congress, and the plaintiff was an officer in the Confederate army. The question presented for decision was, whether the title of the plaintiff, under his deed of May 6, 1862, was divested by the decree of February, 1865, condemning and forfeiting the land as the property of Charles M. Conrad and the sale thereunder to the defendant, and the court, referring to and approving the language of STRONG, J., in *Day* v. *Micou*, held that it was not, and reversed the judgment of the court below, which sustained the defendant's title. It will be noticed that in this case the land was confiscable as against the plaintiff, who, as has been stated, was an officer in the Confederate service, but having been seized and condemned as the property of Charles M. Conrad, the condemnation and sale did not, as the court decided, bar the plaintiff's title. We understand the case to decide the principle that where the property of A., under a title originating prior to the passage of the confiscation acts, is seized, condemned and sold, in proceedings under these acts as the property of B., the title of A. is not divested thereby, although his title was derived from B., and although A.'s title was subject to confiscation, and might have

been divested by seizure and sale, in appropriate proceedings for that purpose.

The record of the District Court was not a defense to this action for another reason, viz.: The confiscation acts do not contemplate or authorize the confiscation of the property of a corporation, and no jurisdiction was acquired by the District Court to proceed for the forfeiture of the debt owing by the Phenix Bank to the Bank of Georgetown. That the property of a corporation is not confiscable under the confiscation acts, was very precisely stated in the opinion of Mr. Justice STRONG in *Planters' Bank* v. *Union Bank* (16 Wall. 496). The opinion upon this point was not, perhaps, essential to the decision made; but it cannot be supposed, in view of the importance of the subject and the frequent occasions upon which the court had been called upon to consider the scope and effect of the confiscation acts, that the remarks of Mr. Justice STRONG upon the subject, in an opinion in which the whole court concurred, were made without full consideration, or without the acquiescence of his associates. And considering the question *de novo*, I fully concur in the opinion of the learned justice upon the point stated. The title of the act of July 17, 1862, indicates that it related to the punishment of natural persons and to the confiscation of the property of individuals who were rebels, within the ordinary meaning of the term. It was "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The first four sections of the act prescribe and regulate the punishment of persons committing treason, or engaging and assisting in the rebellion, and manifestly can have no application to corporations. Corporations cannot suffer death or be imprisoned, as a punishment for crime. The *fifth* section authorizes the seizure of the property of six classes of persons enumerated in the section: 1. Of any officer in the rebel army or navy. 2. Of the acting president and other officers of the so-called Confederate States. 3. Of the governor, members of the legislature, or judge, of any of the Confederate States. 4. Of persons who, having held any office of honor,

trust and profit in the United States, shall thereafter hold any office in the Confederate States. 5. Of persons thereafter holding any office or agency under the government of the Confederate States, or of any of the several States of the Confederacy, subject to a proviso not necessary to be stated. 6. Of persons owning property in a loyal State, etc., who shall thereafter assist, and give aid and comfort to the rebellion. The *sixth* section provides for the seizure of the property of persons who, having engaged in the rebellion, shall not cease to aid and abet the same after the expiration of sixty days, after proclamation made by the president. The confiscation acts do not authorize the seizure and confiscation of the property of all rebels. Under the act of August 6, 1861, it was only property acquired or used by the owner in aid of the rebellion, which was made subject to seizure and condemnation; and under the act of July 17, 1862, it was the property nly of the persons specially mentioned in the *fifth* and *sixth* sections. It is doubtless true that corporations are persons, for certain purposes, in contemplation of law; and as a general rule, in construing penal or other statutes relating to persons, corporations will be deemed to be comprehended, "when the circumstances in which they are placed are identical with those of natural persons." (*Beaston* v. *The Farmers' Bank of Delaware*, 12 Pet. 134; *United States* v. *Amedy*, 11 Wheat. 412.) But this is a rule of construction merely and yields to an indication of a contrary intention derived from a consideration of the scope and purpose of the particular statute. We are of opinion that such indication does not exist in the confiscation acts. The statutes of 1861 and 1862 are *in pari materia*. They relate to the property of sentient beings possessing a will impelled by motives, and capable of forming an intent. As said by STRONG, J.: "Both of these acts had in view property of natural persons who were public enemies, of persons who gave aid and comfort to the rebellion, or who held office under the Confederate Government, or under one of the States composing it."

The District Court, upon this construction of the confisca-

tion acts, in directing the seizure and decreeing the confiscation of the property of the Bank of Georgetown, acted wholly outside of its jurisdiction, and the entire proceedings, including the seizure, condemnation and distribution, were void, and constituted no justification to the defendant in paying over the fund to the marshal. The acts did not confer upon the District Court general jurisdiction to seize and confiscate enemies' property. It had no jurisdiction whatever to seize and condemn the property of corporations, but of natural persons only. That the case was not one within the jurisdiction of that court appeared upon the very inception of the proceedings. The information disclosed that the property proceeded against was the property of a corporation; the mandate of the court directed its seizure as the property of a corporation; and it was declared to be the property of a corporation in the final sentence of condemnation. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause (*Elliott* v. *Peirsol*, 1 Peters, 328), and an erroneous ruling or decision, in the course of the proceedings, does not render its judgment void; but a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally. (*State of Rhode Island* v. *Comm. of Massachusetts*, 12 Peters, 657; *Wilcox* v. *Jackson*, 13 id. 511; *Thompson* v. *Whitman*, 18 Wall. 457; *The Confiscation Cases* [STRONG, J.], 20 id. 107; *Chemung Canal Bank* v. *Judson*, 8 N. Y. 254.)

The trial judge rejected the record of the District Court on the ground that the proceeding was against specific money, and not against the debt or credit of the Bank of Georgetown with the Phenix Bank, and that the credit was not forfeited or affected by the proceedings. We deem it unnecessary to consider this particular ground of objection to the record, for the reason that the other grounds considered sustain the ruling of the court in refusing to admit the record in evidence.

Statement of case.

The plaintiff's letter to the defendant's president, of the 5th of February, 1865, was not, we think, material to any issue in the case. It would not, if admitted, have thrown any light upon the question whether the plaintiff's transaction with the Bank of Georgetown was a purchase of the debt, or on the question of notice to the defendant.

We think the judgment should be affirmed.

All concur.

Judgment affirmed.

THE MERCHANTS' NATIONAL BANK OF WHITEHALL, Respondent, *v.* SARAH ELIZABETH HALL, Impleaded, etc., Appellant.

Defendant, S. E. H., assigned to plaintiff a certificate of stock in a manufacturing corporation "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. W. H. S. E. H. was the wife of E. W. H., who, at the time the assignment was executed, was largely indebted to the plaintiff and was on the verge of actual insolvency. In an action to foreclose plaintiff's lien upon the stock pledged, *held*, that the assignment, by its terms, included and secured all demands had and held by plaintiff against E., after its execution, as well as those existing at that time; and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security; and that an extension of time, by renewals in the ordinary course of business, granted by plaintiff to E. W. H. for payment of any of the debts, did not discharge the lien upon the stock.

The courts will take judicial notice of the general course of business in a community, including the universal practice of banks.

It seems that S. E. H. could at any time, by giving notice, have restricted the security to demands actually held by plaintiff at the time of notice, and thus have terminated her responsibility.

(Argued December 1, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order

Statement of case.

made May 22, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 18 Hun, 176.)

This action was brought to foreclose a lien claimed by plaintiff upon nine hundred shares of the stock of the Crown Point Iron Company pledged to it under and by virtue of the following assignment:

"WHITEHALL, *December* 1, 1876.

"I hereby assign to I. M. Guy, Esq., Cashier of the Merchants' National Bank of Whitehall, the annexed certificate No. 103, nine hundred shares Crown Point Iron Company Stock, as security for the payment of any demands the Merchants' National Bank may from time to time have or hold against Edwin W. Hall.

"SARAH ELIZABETH HALL."

At the time of the assignment plaintiff held a large amount of paper made or indorsed by said Edwin W. Hall, who was the husband of the assignor. New paper, with his name thereon, was subsequently discounted from time to time; the old paper was, in some instances, replaced by renewal notes. The court found, that when a renewal note was thus accepted, plaintiff intended to extend the time of payment of the debt until the new note became due, and that the renewals were without the knowledge or consent of Mrs. Hall. The court found, as a conclusion of law, that the pledge was a security for all of the indebtedness of Hall to plaintiff existing at the time of trial.

Further facts appear in the opinion.

Esek Cowen for appellant. The judge at the trial erred in holding that this collateral security was applicable to demands that were in existence at the time such security was assigned for the benefit of the bank. (*Dobbin* v. *Bradley*, 17 Wend. 422; *Glyn* v. *Hertel*, 4 Com. L. R. 112; *Wright* v. *Johnson*, 8 Wend. 512; *Morrill* v. *Cowan*, 20 Moak's Eng. Rep., ; *Hyatt* v. *Grover & Baker S. M. Co.*, 41 Mich. 225; *Crowder* v. *Dick*, 24 Miss. 39.) The court erred in holding that the

extensions of time given E. W. Hall by the several renewal notes, without the consent of the defendant, did not discharge her liability upon the debts so extended. (*Gahn* v. *Niemcewicz*, 11 Wend. 312; *Chester* v. *Kingston Bk.*, 16 N. Y. 336; *Smith* v. *Townsend*, 25 id. 479; *Billington* v. *Wagoner*, 33 id. 31; *Samuel* v. *Howarth*, 3 Merivale, 272; *Davies* v. *Stainbank*, 6 De Gex, McN. & G. 679; *Howell* v. *Jones*, 4 Tyrwhitt, 548; 1 Crompton, Messon & Roscoe, 97; *Smith* v. *Townsend*, 25 N. Y. 479; *Hill* v. *Beebe*, 13 id. 556, 563; *Dorlin* v. *Christie*, 39 Barb. 610; *Fellows* v. *Prentiss*, 3 Denio, 512; *Pratt* v. *Coman*, 37 N. Y. 440; *Lowman* v. *Yates*, id. 601; *Myers* v. *Wells*, 5 Hill, 463; *Place* v. *McIlvain*, 38 N. Y. 96; *Tobey* v. *Barber*, 5 Johns. 68; *Putnam* v. *Lewis*, 8 id. 389; *Van Epps* v. *Dillaye*, 6 Barb. 244; *Hubbard* v. *Gurney*, 64 N. Y. 457, 466; *Albany City Ins. Co.* v. *Devendorf*, 43 Barb. 478; *Pomeroy* v. *Tanner*, 70 N. Y. 551; *Calvo* v. *Davies*, 8 Hun, 222; *Grant* v. *Strong*, 46 N. Y. 93.) The giving of a note for a debt, or a new note in place of an old one, is not payment of the old debt or security unless there is an express agreement to that effect, and it is doubtful if even an express agreement is sufficient. (*Cole* v. *Sackett*, 1 Hill, 516; *Hill* v. *Beebe*, 13 N. Y. 556; *Bates* v. *Rosekrans*, 37 id. 409; *Highland Bk.* v. *Dubois*, 5 Denio, 558; *Burdick* v. *Green*, 15 Johns. 247; *Van Epps* v. *Dillaye*, 6 Barb. 244; *First Nat. Bk. of Chittenango* v. *Morgan*, 6 How. 346; *Parrott* v. *Colby*, 71 N. Y. 597; affirmed, 6 Hun, 55; *Jagger Iron Co.* v. *Walker*, 76 N. Y. 521; *Hill* v. *Beebe*, 13 id. 556; *Babcock* v. *Morse*, 19 Barb. 140; *Brinckerhoff* v. *Lansing*, 4 Johns. Ch. 65; *Bank of Utica* v. *Finch*, 3 Barb. Ch. 193; *Durham* v. *Dey*, 15 Johns. 554; *Parrott* v. *Colby*, 71 N. Y. 597; *Vail* v. *Foster*, 4 id. 312; *Noel* v. *Murray*, 13 id. 167; *Tobey* v. *Barber*, 5 Johns. 68.)

Samuel Hand for respondent. The words of a guaranty are to be taken as strongly against the guarantor as the sense will admit. (Fell on Guaranty, 141 [130]; 62 Barb. 351; 7 Pet. 122; 12 East, 227; 3 Wheat. 148.) A pledge of personal

property is an executed contract, and requires no consideration, any more than a gift. (*Richardson* v. *Mead*, 27 Barb. 180; *Arthur* v. *Brooks*, 14 id. 535; *Towsley* v. *McDonald*, 32 id. 604; *Stone* v. *Frost*, 61 N. Y. 613; *Wilson* v. *Little*, 2 Comst. 443; *Hasbrouck* v. *Vanderwoort*, 4 Sandf. 74; *Lewis* v. *Graham*, 4 Abb. 106; *McLean* v. *Walker*, 10 Johns. 471; *Wheeler* v. *Newbould*, 16 N. Y. 392.) The word "demands," as used in the assignment, refers to each and every separate obligation upon which E. W. Hall is liable, and not to the indebtedness in mass of Hall to the bank. (*Altham's Case*, 8 Rep. 299; Coke's Notes, 305; Bacon's Abr., "Release," 1; Co. Litt. 291 *b*; *Merle* v. *Wells*, 2 Campb. 413; *White's Bank* v. *Myles*, 73 N. Y. 335; 3 Kern. 239.)

FOLGER, Ch. J. The difficulty presented by this case is, to determine just what the plaintiff and defendant agreed to when she made and it received the assignment of the stock.

The first question is, did they mean that it should be a security for debts of Hall that had arisen before the making of the pledge? It is true, as claimed by the defendant, that the instrument is prospective, and that such an agreement as this does not refer to past transactions in the absence of language to that effect. The application that the defendant seeks to make of this rule is, that the guaranty applies to no debt that arose before the agreement was made. The agreement does not in terms name or describe debts made before the pledge. It does not in terms name or describe acts that were done or could have been done, only before the pledge. It does speak of acts which, though begun before the agreement, could be continued and thus be acts done after its making. When it provides for demands that the plaintiff may from time to time have and hold against Hall, it speaks of the act of having and holding a demand; and that is an act that could be done after the making of the agreement, though the demand arose before, and though as an act of having and holding it, it was begun before. If Hall had, before the date of the agreement, made

his note to a stranger, and after that date the plaintiff had become the assignee of the note, the plaintiff would have had and held it after the making of the pledge. The demand thereon would have fallen within the language of the agreement; whether within the intention of the parties to the agreement is another question. It would have been a demand had and held by the plaintiff from time to time (that is, at any or some time during the running of the agreement), against Hall, and so would have been literally one of the demands spoken of by the instrument. It is plain then that the date of origin of the demand is not the test whether the pledge applies to it. The act of having and holding is. Now that act (the act of having and holding after the pledge was made) might be done as well of a debt that arose before the pledge was made as of a debt that arose afterward; and notwithstanding there was also a having and a holding of the debt before. We see no reason in the language of the assignment for taking from the effect of it demands that arose before it was made, if the plaintiff had and held them after it was made. The defendant concedes that the phrase, "any demands the Merchants' National Bank may have," does apply to debts existing at the time of making the pledge. She insists that the phrase "from time to time" necessarily refers to future debts, and thus limits the effect of the phrase "may have." So it might, if that was the only proper and necessary reference of that phrase. It refers no more to debts than it does to the act of having and holding them. So it is not the debt only that may be in the future of the agreement, but also the act of having and holding; and that act may be of that future time, though it be a holding of a debt created before the agreement.

It is said by the defendant that there is no presumption that she undertook, without any consideration, to pay Hall's past debts when the fair construction of the language applies it more properly to future loans. This assumes the matter in debate, viz.: whether the fair interpretation of the language does apply it more properly to future loans. We have endeavored to show that it does not. So far as the existence of any consider-

ation for the agreement is to be gathered from the terms of it, it is one as much for the continued holding of past-made debts as for debts to be made afterward. There is no promise in the paper of loans, advances or credits. Nor does the paper name a condition of that kind. To be sure, the ordinary guaranty for future advances is more commonly to be met with than one for past debts. Yet a pledge of lands by mortgage, or of personal property by assignment, as a security for the indebtedness of another already incurred, is not a strange thing. The terms of this agreement and the course of affairs among men do not forbid a presumption of the latter being the purpose of the parties any more than they do the other. It is urged that if the hypothecation applied to past debts, the bank, the next day after it was made, could have sold the stock to pay Hall's debts. This position would be more formidable if, with the interpretation of the defendant, the agreement did not show her exposed to the same disaster. Grant that the paper applies to future debts alone. It does not provide for their amount, or kind, or time of credit. Hall might, the day after the assignment was made, have drawn his sight draft or his bank check in favor of the plaintiff to any amount and have thus put it in the power of the plaintiff to sell the stock at once and swamp it.

We think that the language of the agreement is to be interpreted as applying the pledge to demands against Hall, held and owned by the bank after the making of it, though the debts arose before. To what extent courts will go in applying language to past transactions may be seen in *Nares* v. *Rowles* (14 East, 510).

The second question is, did the gift of time by the plaintiff to Hall, for payment of any of the debts, discharge the stock from liability? The agreement by which the stock is hypothecated makes it a continuing security. The words "any" and "may have or hold from time to time," clearly have that effect. (*Douglass* v. *Reynolds*, 7 Peters, 113; *Agawam Bank* v. *Strever*, 18 N. Y. 502.) The effect of a continuing security is that it applies to any future transaction between the parties

that is within the limits of the agreement. The instrument before us is as wide in limit as it could well be. It does indeed specify the party for whose benefit it is made, and the person, Hall, whose dealings with that party are guaranteed. It also engages for the payment, rather than the collection, of the demands against Hall; though that is hardly a narrowing of the liability of the stock. By specifying the plaintiff, a National bank, as the party for whose benefit it is made, an implication arises that the dealings of Hall and the bank are such as are usual in the business of a bank of loan and discount with a borrower from it. This might sometimes operate to limit the liability of the guarantor. Otherwise than by these there are no limits expressed in the assignment by which the operation and effect of it are held in. It specifies no kind of demand, no amount, no length of time of any indebtedness, no length of time for which the stock might be liable. In the last particular it was susceptible of a limit being put upon it, at any time after it was made, at the will of the defendant. She might, by giving notice, have restricted it to the demands actually held by the bank at the time of notice. (*Mason* v. *Pritchard*, 2 Camp. 436; 18 N. Y. *supra*.) As it reads, it is unlimited in period. As it particularizes no demand, it applies to "debts successively renewed." (*Merle* v. *Wells*, 2 Camp. 413.) We do not suppose that these words of Lord ELLENBOROUGH in that case meant the same as the technical renewals of a matured note by a bank. Those of Judge STORY in *Douglass* v. *Reynolds* (*supra*, at page 125), come nearer, if not quite to it: "This being a continuing guarantee, in which the parties contemplated a series of transactions, the defendants must necessarily have understood that there would be successive advances, acceptances and indorsements, which would be renewed and discharged from time to time." It is not to be denied that a guarantor may be held for all that is done by or for his principal that was contemplated by the contract. (*N. H. Sav. Bk.* v. *Gill*, 16 N. H. 578.) Nor is it to be denied that it is contemplated by a continuing contract of guaranty that the creditor and the principal will

carry on the business provided for in the manner in which it has theretofore, to the knowledge of the guarantor, been transacted. (Id.; *Reddish* v. *Watson*, 6 Ham. [Ohio] 510.) Further than that, the contract of continuing guaranty contemplates that the unparticularized transactions of the creditor and the principal will be carried on in the usual course of the business provided for. (*N. H. Co. Bk.* v. *Mitchell*, 15 Conn. 206; *Combe* v. *Woolf*, 8 Bing. 156, seems to recognize such principle; and so does *Howell* v. *Jones*, 1 Cr. Mees. & Rosc. 97. See, also, *Fox* v. *Parker*, 44 Barb. 541.) The creditor here is a National bank and the dealings anticipated were in a banking business. The general course of business in a community, including the universal practice of banks, is a matter of which the courts may take judicial notice. (18 N. Y. *supra*, 512.) It is a practice of banks, either with favored customers or with debtors who are not able to pay at maturity, to renew the obligations on payment of a new discount. If the customer is in good credit, it is just as profitable, and quite as convenient, to take a new note, without payment in money of the old one, and to receive from him the price of another discount. If the debtor is not in good credit, it is expedient sometimes to keep his debt along by renewals, taking from him the discount at each extension. These are gifts of time. It was in this way that the plaintiff gave time to Hall. We have a right to assume that Hall was of one of these classes; that the bank and he sought to provide for such a course of business; that the hypothecation was got to make it safe for the bank and to give credit to Hall; and that it contemplated such a series of transactions. The defendant put into the possession and power of use of the bank and Hall her stock and the assignment, without any express restriction thereon. The legal presumption in such case is that the parties intrusted with it were authorized to use it in any legitimate way in which it could be made subservient to their purposes. (18 N. Y. *supra*, 513.) She was not perpetually bound by the pledge she had made as a continuing guaranty, and could have terminated her responsibility at any time by notice. (Id.) Whenever she should have done

that, the liability of her stock would have been that of a specific guarantor for the payment of the very demands then existing, and she would then have had a right that they be not changed or extended so as to interfere with her right to perform and be subrogated. It was not so with her subsisting guarantee, made in contemplation of the course of dealing that was had under it, and to which she is to be taken to have been a pre-assenting party.

So far we have gone upon the reading only of the instrument of pledge and the presumptions arising from what is found in it. When we look into the facts as they existed when the parties made their agreement, and construe the paper by the application to it of them, our interpretation is sustained. The defendant was a married woman, the wife of the debtor Hall. He had some connection with the plaintiff closer than that of a borrower merely. The plaintiff was a bank of loan and discount. It was located in an interior village. Presumably its capital was small — not over $200,000. Hall was liable to it in one form and another in over $72,000, or over one-third its presumed capital. His credit was gone. His means were not enough to set it up again. He, and others for whom he was liable, or who were liable for him to the plaintiff, were on the verge of actual insolvency and legal bankruptcy. The plaintiff was then holding debt against him, for which it afterward took, as collateral security, a pledge of shares of its own capital stock. Such was its own financial state that that stock on sale realized but forty cents on the dollar. It is plain that the condition of the bank was such that the main thought of the managers of it must have been, how to save it from ruinous loss by Hall. The situation was such as is often known to the practical or judicial observer, and so is the remedy that is usually sought for and applied. The safety of the large accrued indebtedness depended upon the continuance of the debtor in business, in hope of his future success. There was no thought of payment immediately or soon. The practicable methods were to give time on his debts; to give him continued and regularly recurring support, favor and lenity. This was

so doubtful in prospect as to require some consideration to move the creditor thereto. So much of the ready means of the creditor was already in the indebtedness, as that funds were not in hand for an actual loan of money on new obligations, and an actual payment of old debts with that loan, though sufficient security had been offered. When, in such case, the debtor is found furnishing collateral security in pledges of property by relatives or friends, or guaranties of personal liability, the inference is not strained, it is ready, that the attempt is to be made to tide the debtor over his embarrassments, to keep his head above water until times shall change, business revive, properties enhance, depreciated assets improve in value and be converted. It is idle to suppose that in such circumstances the plaintiff and Hall were about to start a new-formed business relation, and that the method, unusual in such cases, of the pledge of the capital stock of a manufacturing corporation, was taken for the safety of a prospective business. The inference is, that the pledge of this stock was sought and obtained as a partial or complete reliance, while the bank, by renewals and extensions, should carry along the indebtedness of Hall. It is plain, then, that it was meant by Hall and the bank as a security for his indebtedness then existing, and that thereafter to arise, in whatever form the demands might take, and after whatever renewals, extensions and changes. Compare this state of facts with the terms of the paper, and they join to support such a presumption. It may be, that the defendant had not precise knowledge of the facts as they then existed; yet it is to be inferred that she had a general understanding of the state of affairs, and that she executed the assignment in view of them. The answer avers that the instrument was got from her by unreal pretenses. The testimony discloses nothing of it. No findings are asked to that end. And it is to be presumed that the assignment was obtained from her fairly, and in view of the condition of affairs then existing. She is bound, therefore, by such a construction of her agreement as arises fairly from the circumstances in which it was used by her authority.

Statement of case.

It is well to say that we have given consideration to the authorities cited for the defendant. The cases cited on the first question we have considered go upon the language used in the contracts there, and upon the reasons drawn from the state of facts peculiar to them. The cases cited on the second question are based upon a principle not denied, that a gift of time to a principal debtor discharges the surety; but it will be found that in them "new arrangements, not contemplated at the time of entering into the guaranties by any of the parties, are introduced; and thus the state of circumstances altered without the contemplation and without the consent of one of the parties." In these cases of guaranties, the decision in one does not aid greatly in the disposition of another, save as some principle is evolved applicable to all alike. (See per STORY, J., 7 Peters, *supra;* per PARK, J., *Hargreave* v. *Smee*, 6 Bing. 244; *White's Bank* v. *Myles*, 73 N. Y. 335.) We have not gone counter to any principles laid down for the reading of unperspicuous contracts, and those are the principles that apply to these contracts of guaranty as well as to others. (*Belloni* v. *Freeborn*, 63 N. Y. 383.) We have felt the importance of the case. We state, as the conclusion of our judgments, that the courts below made no error.

The judgment appealed from should be affirmed.

All concur, except DANFORTH, J., not voting.

Judgment affirmed.

RYNEAR VAN GIESSEN, Appellant, etc., *v.* SAMUEL BRIDGFORD, Respondent.

Where, upon application for letters of administration with the will annexed, it appears that there are no assets, or the presumption arises from lapse of time that there are no assets of the testator in existence which can be identified and reached by the administrator, and there is no claim in respect to them which can be enforced, and no other reason appears, the granting of letters cannot be claimed as a matter of right, and the application may be properly refused.

Statement of case.

B. died in 1663, in the (now) county of Albany, leaving a will of real and personal estate. By the will her children and grand-children were nominated and instituted as "her sole and universal heirs;" no person was named as executor. On application to the surrogate of said county for letters of administration with the will annexed, the applicant presented a certificate of the clerk of the Court of Appeals to the effect, that upon examination of the records, etc., of the former Court of Prerogatives and Court of Probate, he was unable to find any record of letters of administration on the estate of B. The oldest of these courts had no existence until over twenty years after the death of B. Also, a certificate of the clerk of Albany county, that no record of such letters could be found in his office. Proof was given of conveyances by the heirs and those claiming to represent them, of real estate of which B. died seized. A family Bible and a pair of ear-rings were produced by a witness who testified in substance, that her mother was a descendant of B.; that the articles produced came to her mother from a son of B., and that her mother told her that the Bible was once owned by B. *Held*, that the application was properly denied; that it may and should be presumed that administration had been had of the estate, or that the rights and interests of all the parties interested had been satisfactorily adjusted between them, as when the testator died there were courts in the New Netherlands (which embraced what is now the city of Albany) having probate jurisdiction, which jurisdiction has been continued from that time down in those and other courts; that the certificates produced did not rebut such presumption. Also, that as the evidence tended to show that the instituted heirs accepted the inheritance, having executed conveyances of the real estate, and as according to the civil law then in force, the said heirs became, upon such acceptance, absolutely bound to pay debts and perform the directions of the will, after the lapse of two centuries the surrogate was not only justified in deciding, but was bound to decide, that the will had been executed, and that there were no goods, etc., unadministered.

The will directed that the "four first born children" of the testator "shall divide out of their father's property the sum of one thousand guilders, to be paid by them out of the proceeds of a certain farm * * * before any other division takes place." *Held*, that this did not work an equitable conversion of the farm from real estate into personalty; that the distinction in the English law between the descent of real and the distribution of personal estate, upon which the doctrine of equitable conversion was founded, did not exist in the law which prevailed in New Netherlands at the time the will was made; also, that the effect of the provision was simply to create a charge upon the land in the hands of the devisees; and that assuming that by implication a power and duty was imposed on the "universal heirs" to sell, this power would not devolve upon an administrator with the will annexed.

(Argued December 1, 1880; decided January 18, 1881.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made at the May term, 1879, affirming an order of the surrogate of Albany county, denying an application for letters of administration, with the will annexed, of the goods, etc., of Anneke Jantz Bogardus, deceased. (Reported below, 18 Hun, 80.)

The facts are set forth sufficiently in the opinion.

J. J. Perry for appellant. A surrogate cannot determine the question of limitation and lapse of time; nor whether it has barred the remedy to recover alleged unadministered assets; or whether the proposed administrator with the will annexed would have any legal or equitable cause of action for the benefit of the estate. (Redfield's Surr. Pr. 151; *Pumpelly* v. *Tinkham*, 23 Barb. 321.) Section 22 of 2 Revised Statutes, 72, gives full power to an administrator with the will annexed to do and act as an executor named, and such power is fully supported by authorities. (*Dominick* v. *Michael*, 4 Sandf. 374; *Beekman* v. *Bonsor*, 23 N. Y. 298.) As to other property besides the two pieces of real estate specifically mentioned by the testatrix, the will must be construed as a whole, and the intent derived therefrom. (*Taylor* v. *Dodd et al.*, 2 T. & C. 88; *Thurmway* v. *Harmon*, 4 Hun, 411; *Moncrief* v. *Ross*, 50 N. Y. 431; *Hayes* v. *Gourley, admr.*, 3 T. & C. 115.) To confer jurisdiction upon a surrogate for the purpose of letters of administration with the will annexed, the value of property is merely nominal, and *prima facie* evidence of assets is sufficient. (*Sullivan* v. *Fosdick*, 10 Hun, 173; *Rugan* v. *Allen et al.*, 7 id. 537; *Tracy* v. *Tracy*, 15 Barb. 503; *The Roman Catholic Church* v. *Wachter*, 42 id. 43; Hill. on Trustees, 360.) When an executor or administrator is appointed, his powers and jurisdiction relate back to the time of the death of the deceased, and all property of which he had possession, or which rightly belonged to his estate at that time, would vest in the executor or administrator. (*Allen*

v. *Eighmie*, 9 Hun, 201; *Vroome* v. *Van Horne*, 10 Paige, 549; *Sullivan* v. *Fosdick*, 10 Hun, 173.)

Charles T. F. Spoor for respondent. The petition for letters of administration, with the will annexed, must show such a state of facts as would authorize the granting of letters of administration on the estate of the deceased, if it were shown that she had died intestate. (Dayton on Surrogates, 249; 3 R. S. [5th ed.] 158, § 23; 5 N. Y. 497.) From the lapse of time, the court must presume that what ought to have been done in the carrying out of the will of the testatrix was done, and that its provisions were carried out, or a satisfactory settlement of the estate had between the heirs. (1 Col. Doc. of New York; Daly's Historical Sketch of the Judicial Tribunals of New York, prefixed to E. D. Smith's; *Matter of Brick's Estate*, 15 Abb. Pr. 18, 21; 1 Laws of New York [Jones & Varick's ed.], 23; 2 id. 71.) The heirs of the testatrix, under the Dutch law prevailing in the province of New Netherlands at the time of her death, were her executors. (Daly's Historical Sketch, pp. 26, 28; *Matter of Brick's Estate*, 15 Abb. Pr. 17; 2 Domat's Civil Law [Cushing's ed.], 432, §§ 3330–3332; Grotius' Dutch Juris. 120, § 7; Van Leeuwen's Commentaries on the Roman-Dutch Law, pp. 243, 244, §§ 1, 3; Translator's Preface to Van Der Linden's Institutes; 18 Hun, 80; Daly's Historical Sketch; 1 E. D. Smith, 17, 26.) The doctrine of equitable conversion, invoked by the appellant in the court below, to show personal property remaining unadministered, as a foundation for this application, does not apply. (2 Ves. 184; 26 Barb. 224; 7 N. Y. 242; *Reed* v. *Reed*, 12 Barb. 113; *Murray* v. *Murray*, 2 Ch. Sent. 23.)

ANDREWS, J. The appellant claiming to be a descendant (of the seventh generation) of Anneke Jantz Bogardus, who died in the village of Beverwyck (within the present city and county of Albany), on or about the 19th day of March, 1663, presented his petition to the surrogate of the county of Albany on the 18th day of July, 1877, praying that letters of adminis-

tration, with the will annexed, of the goods, chattels and credits of the said Anneke Jantz Bogardus, left unadministered, be granted to the petitioner. The petitioner alleged in his petition the death of Anneke Jantz Bogardus, leaving a will of real and personal estate, executed on the 29th day of January, 1663, a copy of which was annexed to the petition.

By her will the testatrix nominated and instituted "as her sole and universal heirs" her six children living, and two children of a deceased daughter, "representing together their mother's place," and gave and bequeathed to them all her real estate, chattels, credits, money, gold and silver (coined and uncoined), jewels, clothes, linen, woolen, household furniture, and all property whatsoever, "to be disposed of after her decease, and divided by them in equal shares, to do with the same at their own will and pleasure, without any hindrance whatsoever," subject, however, to the following direction, viz.: "that her four first born children shall divide, out of their father's property, the sum of one thousand guilders, to be paid to them out of the proceeds of a certain farm, situate on Manhattan Island, and that, before any other division takes place;" that Jan Roelofson shall "receive a bed and milks cow;" Jonas and Peter Bogardus a house and lot in the village of Beverwyck, besides a bed and milch cow each; and each of four grandchildren (named) a silver mug; "all the above donations to be provided for out of the first moneys received, and afterward the remainder of the property to be divided and shared as aforesaid."

No person was named as executor in the will. It was alleged in the petition that of the goods, etc., mentioned in the will, there yet remain, to the best of the petitioner's knowledge and belief, a family Bible and other chattels undivided, and that Anneke Jantz Bogardus died seized and possessed of certain goods and chattels "hereinbefore" (in the will) "set forth," together with other personal property to a large amount, and a large amount of real estate, situate in the (now) cities of New York and Albany and elsewhere, and that no administration of the estate of the decedent has ever been

had. Upon the presentation of the petition, the surrogate issued a citation to the persons named therein as next of kin of the testatrix, and upon the return of the citation the respondent (also claiming to be a descendant of the testatrix, of the fifth generation) appeared before the surrogate, and filed objections to the granting of the petition, and the surrogate afterward proceeded to hear the proofs of the parties.

The death of Anneke Jantz Bogardus at Beverwyck in 1663 was admitted. The petitioner offered in evidence (1) a certified copy of the will of the decedent, certified by the clerk of Albany county, as a copy of the original, recorded in his office "in Notarial Papers 1660–1676, p. 296;" (2) A certified copy of a patent granted by Governor Nicolls, March 27, 1667. confirming "unto ye children and heirs of the sd. Anneke Bogardus in their possession and enjoyment of the premises," a certain parcel of land "on the island Manhattans toward the North river," containing about sixty-two acres, theretofore (as recited) patented to Anneke Jantz, July 4, 1654, by "the Dutch governor, Peter Stuyvesant;" (3) A certified copy of a similar patent of the same date, confirming the title of the heirs to one hundred and thirty acres, "near Mespat's mills, upon a neck of land commonly called Dominie's Hook;" (4) A certified copy of a similar patent, dated July 10, 1667, confirming "unto ye heirs of ye said Annette Bogardus" a lot "lying near ye fort at Albany;" (5) A certificate of the clerk of the Court of Appeals, certifying that upon examination of wills, letters of administration and other files and records of the former Court of Prerogatives and Court of Probate, he was unable to find any record of letters of administration granted upon the estate of Anneke Bogardus, and a certificate by the clerk of Albany county, that no record of such letters could be found in his office.

The respondent offered in evidence, (1) a bill of sale (so called) by the heirs of "Annetian Bogardus," dated June 21, 1663, to Dirk Wesselse, of "their late mother's" house and lot in Beverwyck, for one thousand guilders, "payable in good merchantable beaver skins at eight guilders a piece," executed

by three of the children of the testatrix for themselves, "and by order of the other heirs," and also by the purchaser; (2) a deed to Dirk Wesselse of the same premises, dated July 27, 1667, purporting to be executed by Peter Bogardus and Jonas Bogardus for themselves, and as attorneys for the children and heirs of their mother, which deed acknowledged payment in full of the contract of June 21, 1663, and contains a covenant by the grantors to protect the title of the grantee; "and further, never to do nor suffer any thing to be done against the same, either with or without law, in any manner, on pledge of person and estate, nothing excepted, subject to all laws and judges."

In addition to the documentary evidence above stated, a family Bible and a pair of gold ear-rings were produced by a witness called by the appellant, who testified that her ancestors on her mother's side were named Bogardus; that the family Bible and ear-rings came to her mother from her ancestors; that the Bible came down to her mother from Peter Bogardus, a son of Anneke Bogardus, and that her mother said the Bible was once owned by Anneke Jantz Bogardus. Upon these proofs the case was submitted to the surrogate, who made an order denying the appellant's application, and on appeal to the General Term the order was affirmed, and from the order of affirmance this appeal is taken.

The statute (2 R. S. 73, § 23) confers upon the surrogate of each county exclusive jurisdiction within his county to grant letters of administration of the goods, chattels and credits of persons dying intestate, in cases (among others) where the intestate at or immediately preceding his death was an inhabitant of the county of such surrogate, and provision is also made for granting letters of administration with the will annexed in the cases specified in 2 R S. 71, § 14. The cases specified in section 14 do not seem to include the case where no executors are named in the will, but it was stated by DUER, J., in *Dominick* v. *Michael* (4 Sandf. 415), that the power of the surrogate extended to such a case, and this jurisdiction is understood to have been generally

exercised by surrogates' courts. But the power to issue letters of administration of the goods, chattels and credits of a decedent generally presupposes the existence of assets left by the decedent to be administered, and that administration has not already been had. There may be cases where letters of administration are necessary to be granted for other purposes than the recovery and distribution of assets, and we do not intend to say that the existence of assets is essential to the jurisdiction of the surrogate to grant letters of administration. But when it appears that there are no assets, or the presumption arises from lapse of time that there are no assets in existence which can be identified or reached by an administrator, and no claim in respect to them which can be enforced, and no other reason for issuing letters appears, the granting of letters cannot, we think, be claimed as a legal right, and the application therefor may be properly refused. In this case, however probable it may be that Anneke Jantz left personal assets at her death, there is no legal proof that she did so. It is true that she bequeathes personal property by her will, but the recital in the will is not legal evidence of the fact that she owned personal property at her death, and in respect to the family Bible and ear-rings, the evidence only goes to the extent of showing a tradition in the family that these articles were once owned by her, but the tradition is equally consistent with the supposition that she disposed of them before her death, as that she had them at that time.

It is claimed that the provision in the will that the four first born children should be paid one thousand guilders out of the proceeds of the farm on Manhattan Island, before any other dividend is made, worked an equitable conversion of the farm from real estate into personalty, and upon this fiction of courts of equity, counsel bases an argument that the farm is to be treated as personal assets left by the testatrix. There are several answers to this claim. The doctrine of equitable conversion is a doctrine of English equity law, and was not generally acted upon or recognized by the English courts until about the time of Charles II. (Leigh & Dalzell on Eq. Con. p. 2.)

The doctrine grew up in part at least in consequence of the difference in the rules of the English law, governing the descent of real, and the distribution of personal property, a distinction which did not exist in the Roman-Dutch law which prevailed in the New Netherlands at the time the will in question was made. But the effect of the direction in the will that the four children mentioned should be paid a thousand guilders out of the proceeds of the Manhattan farm was simply, we think, to create a charge on the land in the hands of the devisees to be enforced under our system by an action by the beneficiaries, or their representatives. There was no executor named in the will, and no express power was conferred upon any one to sell the land to pay the four children named, the one thousand guilders. But assuming that by implication a power and duty was imposed on the "universal heirs" to sell the Manhattan farm to pay the charge, this power would not devolve upon an administrator with the will annexed, according to the authorities, and there is, therefore, no reason founded upon this provision of the will for granting letters of administration. (*Conklin* v. *Egerton's Admr.*, 21 Wend. 430; *S. C.*, 25 id. 224; *Roome* v. *Philips*, 27 N. Y. 357; *Dominick* v. *Michael*, 4 Sandf. 374. 1 Rev. Stat. 734, § 1.)

But we think the order of the surrogate should be sustained for another reason, viz.: That it may and should be presumed that administration had been had of the estate of Anneke Jantz, and the estate settled in the courts of the time, or in the alternative that the rights and interests of all the parties interested were satisfactorily adjusted between themselves.

When the testatrix died there were courts in the New Netherlands (which embraced the present city of Albany), having probate jurisdiction, and jurisdiction to settle the estates of decedents. And after 1664, when the New Netherlands came under the power of England, the existing courts were continued or other courts with similar jurisdiction were instituted, and later and subsequent to 1686, the prerogative court, having probate jurisdiction in the colony of New York, was established, which

continued until 1778, when it was abolished and the court of probates instituted in its stead, and in 1787, probate jurisdiction of wills and of administration of estates of decedents was taken away from the court of probates and given to the surrogates of the different counties, where it has since remained. The history of these various courts will be found in the very learned and valuable monograph of Chief Justice DALY, of the New York Common Pleas, prefixed to 1st E. D. Smith's Reports. Most of the records of these early courts of two centuries ago are destroyed or cannot be found, and doubtless the proceedings were often quite informal. But (if necessary) it ought to be assumed, in the absence of proof to the contrary, that the parties interested in the estate of Anneke Jantz, resorted to the courts for the settlement of what is claimed to have been the large estate of their ancestor, and that their rights were duly adjusted therein. The fact that no record can be found in the office of the clerk of this court of letters of administration granted by the prerogative, or the probate courts (the earliest of which had no existence until more than twenty years after the death of Anneke Jantz), do not rebut the presumption that the estate was settled by proper judicial proceedings, and no reason is shown for supposing that the early records of administration would be found in the clerk's office of Albany county.

Again, the documentary evidence tends to show that the *instituted* heirs accepted the inheritance. They entered into the contract with Dirk Wesselse, a few months after their mother's death, and conveyed in pursuance thereof in 1667. In 1667 they (as must be presumed) procured and accepted confirmations to them jointly of their mother's title to the lands owned by her, including the farm on Manhattan Island. According to the civil law the universal or *instituted* heir (who was the general heir appointed by the will of a testator) becomes, upon acceptance of the inheritance, absolutely bound to discharge the debts of the testator and to pay the legacies, and perform the directions of the will. He is both heir and executor. (Domat's Civil Law [Cush. ed.], §§ 2462, 2470, 2595,

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3649; Van Leeuwen's Commentaries on the Roman-Dutch Law, B. 3, chap. 10, § 3; Inst. B. 2, tit. 10, § 10.) The heirs of Anneke Jantz were, therefore, bound to pay all the legacies given by her will, and after the lapse of two hundred years, and in view of the fact that the legatees had an interest in having this duty discharged, the surrogate was, we think, not only justified in deciding, but in the exercise of a fair judgment was bound to decide that the will had been executed, and that there were no goods, chattels or credits of Anneke Jantz unadministered.

The judgment should be affirmed.

All concur.

Judgment affirmed.

SIMON GUTERMAN et al., Respondents, *v.* THE LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMSHIP CO., Appellant.

It is not the province of a witness, testifying as an expert, to draw inferences from the evidence of other witnesses, unless the facts testified to are clear and uncontroverted, or to take into consideration such facts as he can recollect that have been testified to and thus form an opinion, but he should have full information of the ascertained or supposed state of facts upon which his opinion is based.

Where the facts are controverted or are not entirely clear a hypothetical question may be put, based upon the facts claimed to have been proved.

In an action against a common carrier by sea to recover damages for injuries to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the protest and some of the testimony and the evidence covering a great variety of facts, a witness called as an expert by plaintiff, after having testified that he had heard the testimony read to the jury the previous day, and the protest and had heard the testimony of one or two of the witnesses and the circumstances as detailed by them, was asked "under the circumstances detailed by these witnesses and in the protest," and under certain circumstances which were specified, "what in your opinion should have been done by the persons in charge of the steamship?" *Held*, incompetent.

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Under the English statutes in relation to compulsory pilotage in the port of Liverpool an owner of a vessel is not relieved from liability for damage to freight unless a pilot was in charge under the act, and was actually and necessarily engaged in the discharge of his duty.

Where, therefore, a vessel had left its dock at Liverpool in charge of a pilot and anchored in the river Mersey to finish loading and to receive coal for a voyage to New York, and while at anchor an accident occurred causing the loss, *held*, that the owner was not excused from liability by said statutes.

The goods damaged were sold at public auction. *Held*, that evidence of the prices brought was competent as tending to show value, and upon the question of damages.

(Argued December 8, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 3, 1879, affirming a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover damages alleged to have been caused by defendant's negligence to certain goods of the plaintiffs which were shipped on board defendant's steamship, the City of Baltimore, at Liverpool for New York.

On December 25, 1865, the vessel left its dock, at Liverpool, in charge of a pilot, according to the usual custom, the water not being sufficient to allow the loading to be finished at the dock, to finish loading and coaling in the river Mersey.

After the arrival of the steamship at the city of New York, her master, officers and crew joined in making the following protest or statement:

"That on December 25, at 4:30 P. M., came to anchor with seventy-five fathoms chain off the landing stage, according to the usual custom of the port in like cases; weather cloudy, wind strong; at 5 P. M. a steam collier, with about seven hundred tons of coal on board, came alongside; at 7 P. M. commenced coaling, collier secured alongside; at 8 P. M., wind blowing very heavy in squalls and tide running very strong, which raised a nasty cross sea, found the vessel dragging; veered out to ninety-five fathoms, but she did not come

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up till off Egremont, a mile or more distant — the collier alongside, all the time working against and chafing our sides; midnight, strong winds and cloudy.

"December 26th, the wind continued strong throughout the night, collier still alongside; 6 A. M., wind shifted to the northward; the custom, while in the river, is to try the pumps at 8 P. M. and 8 A. M.; this morning, at 8 A. M., the carpenter, as usual, reported the vessel tight; at 10 A. M. the second officer, observing the vessel a little more by the head than usual, ordered the carpenter to sound the pumps; suddenly discovered six feet water in the fore compartment; he immediately reported to the chief officer and pilot; the chief officer immediately sounded the pumps again, and found an increase of water; instantly looked at the sluices which connect compartment with compartment; they were all shut down, and in the same moment he ordered all the pumps to be worked; in ten minutes after sounding again both the fore and main compartments, found the water gaining rapidly; second engineer soon after reported that the water was reaching the stoke-hole plates; the master was on shore attending to the business of the ship, and a messenger was sent for him; all hands at the pumps who could be spared except those searching for the leak; in about twenty minutes the ship had settled about eighteen inches by the bow; consulted the pilot, and we deemed the only course left was to beach the ship, for the leak could not be found; for this purpose, ordered the collier to cast off, which she did; soon after one of the searchers discovered the leak in the main orlop deck, immediately in the wake of where the collier was moored; the chief officer rushed below and saw a large volume of water streaming through a dead-light; after much exertion, and with the assistance of those he called to his aid, succeeded in closing the inner port, which is made of glass, and the leak stopped; then we gave up the idea of beaching the ship. * * * When we had time to look around, discovered the iron bolt that secured the outside and dead-light was broken and fell inside; the dead-light was gone, supposed to have fallen into the river; inboard, nothing

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by any possibility could have broken the bolt, for it was well guarded from any thing reaching or injuring it; we believe the cause of the damage to have been occasioned by the collier in the cross sea while we were dragging or afterward striking against the dead-light violently, and the leak."

The goods in question were damaged by the water which flowed through the broken dead-light.

Upon the trial this protest was read in evidence on the part of plaintiffs. Witnesses were also called who testified to the circumstances of the accident and injury, their statements of the facts differing in a number of particulars from those contained in the statements. The further facts material to the questions discussed are set forth in the opinion.

A. J. Vanderpoel for appellant. Under the complaint it was part of the plaintiffs' duty to give the proof of negligence; it cannot be presumed from the fact that an accident happened. (1 Saunders on Pl. and Ev. 692; *Brothergan* v. *Wood*, 3 Brod. & Bing. 58; *Max* v. *Roberts*, 12 East, 89; *Moriarty* v. *Harnden's Express Co.*; 1 Daly, 227; *Hersfield* v. *Adams*, 19 Barb. 577; *Clark* v. *Barnwell*, 12 How. [U. S.] 272; *Davison* v. *Burnam*, L. R., 4 C. P. 117; *Bostwick* v. *Balt. & Ohio R. R. Co.*, 55 Barb. 137; *Muddle* v. *Stride*, 9 C. P. 380; *Howard* v. *Lindsay*, L. R., 5 P. C. 338; *Lauree* v. *Douglass*, 15 M. & W. 646; *Lamb* v. *Camden & Amboy R. R. Co.*, 46 N. Y. 271; *The Ducro*, 3 Ad. & E. 393.) The court erred in allowing the questions put to the experts. (*Tracy Peerage Case*, 10 Clark & Finn. 191; *Seymour* v. *Reynolds*, 77 N. Y. 178; *McCollum* v. *Seward*, 62 id. 316; *Reynolds* v. *Robinson*, id. 589, 595; *People* v. *Lake*, 12 id. 358; *Carpenter* v. *Beale*, 2 Lans. 206; *The Clement*, 2 Curtis' C. C. 363; *Sills* v. *Brown*, 9 Car. & P. 601; *Ann & Mary*, 2 W. Rob. 195; *U. S.* v. *McGlue*, 1 Curtis, 1; *Rex* v. *Searle*, 1 M. & Rob. 75; *Rex* v. *Wright*, 6 R. & R. C. C. 456; *Commonwealth* v. *Rogers*, 7 Metc. 500; *Freeman* v. *Lawrence*, 43 N. Y. Supr. 288; *Doltz* v. *Morris*, 10 Hun, 201; *Crofut* v. *Brooklyn Ferry Co.*,

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36 Barb. 201; *Taylor* v. *Monnot*, 4 Duer, 116; *Hoard* v. *Peck*, 56 Barb. 202; *People* v. *Thurston*, 2 Park. Cr. 49; *Moore* v. *Westervelt*, 27 N. Y. 234; *Price* v. *Hartshorn*, 44 id. 94; *Walsh* v. *Wash. Marine Ins. Co.*, 32 id. 427; *Cincinnati Ins. Co.* v. *May*, 20 Ohio, 211, 223; *Carpenter* v. *Eastern Transp. Co.*, 71 N. Y. 574–579; *O'Hagan* v. *Dillon*, N. Y. Ct. App., 19 Alb. L. J. 177.) This is not a case in which the opinion of experts not present and witnesses to the occurrence was competent. (*Jeff. Ins. Co.* v. *Cotheal*, 7 Wend. 72; *Moore* v. *Westervelt*, 27 N. Y. 234; *Walsh* v. *Wash. Marine Ins. Co.*, 32 id. 427; *Schermerhorn* v. *Tyler*, 11 Hun, 549; *Frazer* v. *Tupper*, 29 Vt. 409, 411; *Holland* v. *Cammet*, 5 La. Ann. 705; *Nowell* v. *Wright*, 3 Allen, 166; *Milwaukee & St. Paul R. R. Co.*, 94 U. S. 469; *Swartwout* v. *N. Y. C. & H. R. R. R. Co.*, 7 Hun, 571; *Hopkins* v. *Ind. & St. L. R. R.*, 78 Ill. 32; *Chicago* v. *McGiven*, id. 347; *Murphy* v. *N. Y. C. R. R. Co.*, 66 Barb. 125.) The court erred in excluding the evidence that the owners of the ship were compelled to have on board a pilot who had entire charge of the ship, that the officers and crew were compelled to obey his orders relative to the management of the ship, and that by the law of England in cases in which pilotage is compulsory, the owners are exempt from liability for accidents occasioned by the negligent management of the ship during that period. (*Shular* v. *Hud. R. R. R. Co.*, 38 Barb. 653; *Brown* v. *Elliott*, 4 Daly, 329; *Greenfield* v. *Mass. Mut. L. Ins. Co.*, 47 N. Y. 430; *Evans* v. *Williams*, 60 Barb. 346; *Andrews* v. *Bond*, 16 id. 633; *Schermerhorn* v. *Van Allen*, 18 id. 29; *Dunford* v. *Chattels*, 12 M. & W. 529; Roscoe's Digest, 662; *Faverner* v. *Little*, 6 Bing. N. C. 688; *Hart* v. *Crowley*, 12 Ad. & Ell. 378; *Wolf* v. *Beard*, 8 Car. & P. 373; *Lucy* v. *Ingram*, 6 M. & W. 302; *Gen. Steam Nav. Co.* v. *British and Colonial Steam Nav. Co.*, L. R., 4 Ex. 238; *Mitchell* v. *Crasweller*, 13 C. B. 237; *Gen. Steam Nav.* v. *Guillon*, 11 M. & W. 877.)

M. W. Devine for respondents. A clear case of negligence,

directly contributing to and causing the loss, being made out against defendant and its servants, it should be held liable for the consequences. (Angell on Carriers [4th ed.], §§ 166, 167, 168; Story on Bailments, §§ 512 [*a*], 517, 518, 3 Kent [10th ed.], marg. p. 217, and note 1; Abbott on Shipping, 384, and note; *McArthur* v. *Sears*, 21 Wend. 190, 196, 200; *Michaels* v. *N. Y. C. R. R. Co.*, 30 N. Y. 56; *Reed* v. *Spaulding*, id. 630; *Lamb* v. *Camden & Amboy R. R. Co.*, 46 id. 271.) The evidence was such as to make it the duty of the court to subnit the question of negligence to the jury. (*Lamb* v. *Camden & Amboy R. R. Co.*, 46 N. Y. 271; *The J. Russell Manuf. Co.* v. *New Haven R. R. Co.*, 50 id. 121.) This court has jurisdiction of the action, and that jurisdiction is not affected by the act of Congress, passed March 3, 1851. (*Dougan's Adm'x* v. *Champlain Trans. Co.*, 56 N. Y. 1; *Knowlton* v. *Providence & N. Y. S. Co.*, 53 id. 76; *Leon* v. *Galceran*, 11 Wall. 185, 188; *Norwich Co.* v. *Wright*, 13 id. 104; Conklin's Treatise, 271, note [*a*], [3d ed.], 2 Gallison, 476, note 3; *Percival* v. *Hickey*, 18 Johns. 257, 291.) The evidence of the nautical experts was properly admitted. (*Transp. Line* v. *Hope*, 95 Otto [U. S.] 297; *Moore* v. *Westervelt*, 9 Bosw. 558; *Walsh* v. *Washington Marine Ins. Co.*, 3 Robt. 202; *Walsh* v. *Washington Marine Ins. Co.*, 32 N. Y. 427; *Price* v. *Hartshorne*, 44 id. 94; *S. C.*, 44 Barb. 655; *Jackson, etc., Ex'rs* v. *N. Y. C. R. R. Co.*, 2 Ct. & C. 653; *Price* v. *Powell*, 3 Comst. 322; *Malton* v. *Nesbitt*, 1 Carr. & Payne, 70; 11 Eng. Com. Law, 318; *Fenwick* v. *Bell*, 1 Carr. & Kir. 312; 47 Eng. Com. Law, 311; *Sills* v. *Brown*, 9 Carr. & Payne, 601; 38 Eng. Com. Law, 245; *Thornton* v. *The Royal Exchange Assurance Co.*, Peake's Nisi Prius, 37; *Beckwith* v. *Sydebotham*, 1 Camp. N. P. 116; 1 Greenleaf, 493.) The questions put to the experts were correct in form. (*Merritt* v. *Seaman*, 6 Barb. 330; *Ingraham* v. *Baldwin*, 12 id. 9; 5 Seld. 45; *Briggs* v. *Smith*, 20 Barb. 409; *Schermerhorn* v. *Gregg*, 55 N. Y. 670; *Stokes* v. *Johnson*, 57 id. 673; *McNaghten's Case*, 10 Clark & Finnelly, 211; Wharton on Ev., § 452; *Fenwick* v. *Bell*, 1 Carr. & Kir. 312;

Beckwith v. *Sydebotham*, 1 Camp. N. P. 176; *Thornton* v. *Royal Ex. Assur. Co.*, Peake's N. P. 37; *Sills* v. *Brown*, 9 C. & P. 601; *Carpenter* v. *Eastern Transp. Co.*, 71 N. Y. 374.) The rule as to the measure of damages was correctly stated by the court to the jury. (Sedgwick on the Measure of Damages [6th ed.], 356, marginal; *Sturges* v. *Bissell*, 46 N. Y. 462; *Black* v. *Camden & Amboy R. R. Co.*, 45 Barb. 40; *Sherman* v. *H. R. R. Co.*, 64 N. Y. 254; *Ward* v. *N. Y. C. R. R. Co.*, 47 id. 29; *Zinn* v. *W. J. Stbt. Co.*, 49 id. 443; *Campbell* v. *Wordworth*, 20 id. 499; *Renaud* v. *Peck*, 2 Hilt. 137; *Crounse* v. *Fitch*, 1 Abb. Ct. App. Dec. 475; *Gill* v. *McNamee*, 42 N. Y. 44; *Wells* v. *Kelsey*, 37 id. 143; *Parrott* v. *Knickerbocker Ice Co.*, 46 id. 361; *Wehle* v. *Butler*, 3 J. & S. 1; affirmed, 61 N. Y. 245; *Jaeger* v. *Kelly*, 44 How. Pr. 122; *Allen* v. *Fox*, 51 N. Y. 562; *Scherwin* v. *McKie*, id. 180; *Richmond* v. *Bronson*, 5 Den. 55; *Propeller Mary Vaughan* v. *Steamboat Telegraph*, 2 Benedict, 47; *Dana* v. *Fiedler*, 2 Kern. 40; *Andrews* v. *Duran*, 18 N. Y. 496; *Parrott* v. *Knickerbocker Ice Co.*, 46 id. 361.) The evidence in reference to compulsory pilotage, sought to be introduced by the defendant, was properly excluded. (Code of Procedure, §§ 149, 150, subd. 2; *McKyring* v. *Bull*, 16 N. Y. 297; *Bogardus* v. *Trinity Church*, 4 Paige, 197; affirmed, 15 Wend. 111; *Bailey* v. *Johnson*, 1 Daly, 61; *Rodrigues* v. *Nelhuish*, 10 Exch. 110; 24 L. J. Exch. 26; *The Woburn Abbey*, 38 L. J. Adm. 28; *The Maria*, 1 Wm. Rob. 105; *Atty.-Gen.* v. *Case*, 3 Price, 302.)

MILLER, J. Upon the trial of this action the plaintiffs called several witnesses and examined them as experts, and several questions were put calling for their opinion in reference to the management of the ship by the persons who, it was claimed by the plaintiff, had charge and control of the same at the time when she lay at anchor, and the injury was done by the collision with the collier. One Briggs was called by the plaintiffs as a witness, and after stating that he had followed the sea for many years and commanded vessels running between New

York and Liverpool, testified that he was acquainted with the harbor and anchorage of Liverpool, and that he knew how steamships were coaled while at anchor in that harbor, and that he had heard the testimony read to the jury on the previous day, and the protest, and the testimony of one or two of the witnesses, and the circumstances as detailed by them, and was then asked: "Under the circumstances detailed by these witnesses and in the protest, and when a steamship with a collier alongside of her, begins to drag, with the wind blowing heavily in squalls from the south-west, and the collier working and chafing against the steamship's sides, what, in your opinion, should have been done by the persons in charge of the steamship?" The evidence was objected to by defendant's counsel, on the ground, first, as to the general statement "under the circumstances detailed by the witnesses and the protest," and secondly, the question is irrelevant and incompetent, and not a proper question for an expert. The objection was overruled by the court, and an exception taken by defendant's counsel to such ruling and decision. The question put called for the opinion of the witness, and allowed him to say what, under the circumstances, should have been done. In order properly to form an opinion, the witness should have had full information as to the ascertained or supposed state of facts upon which his opinion is based; and he could not be called upon to determine the truth of the facts sworn to before giving such opinion. Nor could the witness be called upon to testify unless a clear state of facts appeared; and it is not his province to draw inferences from the evidence of other witnesses, or to take in such facts as he can recollect, and thus form an opinion. (*Reynolds* v. *Robinson*, 64 N. Y. 589; *McCollum* v. *Seward*, 62 id. 316; *The Ann & Mary*, 2 W. Rob. Adm. 195; *The Clement*, 2 Curtis' C. C. 363. See, also, *Carpenter* v. *E. Trans. Co.*, 71 N. Y. 579; *Cin. Mut. Ins. Co.* v. *May*, 20 Ohio, 211.) When the facts are controverted or are not entirely clear, a hypothetical question may be put, based upon the facts claimed to have been proved by the evidence. (*Freeman* v. *Lawrence*, 11 J. & S. 288; *Dolz* v. *Morris*, 10 Hun, 201; *U. S.* v. *Mc-*

Glue, 1 Curtis' C. C. 1, 9, 10; *Hoard* v. *Peck*, 56 Barb. 202.) A different rule was laid down at *nisi prius* in *Fenwick* v. *Bell* (1 Carr. & K. 312); but this is in conflict with *Sills* v. *Brown* (9 Carr. & P. 601), and a contrary rule is sustained by other cases, some of which are already cited. Whatever may be the rule elsewhere, the decisions of this State to which we have referred are adverse to the doctrine contended for. In the case of *Trans. Line* v. *Hope* (95 U. S. 297), which is relied upon by the respondents' counsel, the question put was different from those propounded in the case at bar, and involved the experience of the witness as a seaman, which might well be, under the circumstances stated, a proper subject for the opinion of an expert.

The rule, after an examination of the authorities, we think, is that, in a case of this kind, a nautical man cannot be called upon to testify as to his opinion upon evidence given by other witnesses, which covers a great variety of facts and calls for a comprehensive and critical view of the testimony given and the inferences to be drawn from the evidence of the witnesses. In this case, there was a discrepancy between the protest and some of the sworn testimony, perhaps not very important, yet at the same time of sufficient consequence to call for the discrimination of the witness as to the bearing of different parts upon the case, and which might not have been fully appreciated or understood without the attention of the witness being especially directed to the subject and the various facts connected therewith. The whole case depended greatly upon the testimony of experts, and, under the circumstances, we think that the question was an improper one and should have been excluded. A point is made by the respondents' counsel, that no proper objection was taken to the form of the question; and the specific error in form not being pointed out, it must be held to be waived. The objection was distinctly made to the general statement as to the evidence given by the witnesses and contained in the protest, and that the question was not a proper one for an expert, thus calling attention to the form of the question, and was not, we think, required to be more specific.

Some of the other questions put are especially urged as grounds of error; but as the one considered was improperly received, it is not necessary to examine them.

An objection is also made that there was error in excluding the evidence in reference to the owners of the ship being compelled to have on board a pilot who had entire charge of the ship, whose orders the officers and crew were bound to obey relative to the management of the ship, and that, by the law of England, pilotage was compulsory and the owners were exempt from liability for accidents caused by the negligent management of the ship during that period. The defendant's counsel read in evidence different sections of the act to consolidate and amend the provisions of the several acts relating to the Liverpool and Birkenhead docks in the port and harbor of Liverpool, and offered to put the whole act in evidence, alluding to those portions which were material. He also read from section 388 of the Merchants' Shipping Act, which is as follows: "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law," and various decisions of the courts of England giving a construction to the acts in question. The evidence was excluded, on the ground that the defense ought to have been pleaded, and if pleaded, the facts offered to be proved would have been no defense. The evidence of Mr. Inman, an owner and the manager of the defendant's line, showed that, according to the usage of the port of Liverpool, the captain was not required to be on board of steamers when anchored in the river in charge of a pilot, without reference to the act of Parliament, and that the pilot is in full charge of the ship, and officers and crew are only responsible to obey his orders, and that any disobedience of any proper order given by the pilot would throw the liability for any damage upon the owners. This, however, was contradicted by the plaintiffs' evidence; and, as the evidence stood, it was a question of fact for the jury, whether the pilot had exclusive control and charge of

the ship, so as to exonerate the defendant from liability. Whether the liability of the defendant was affected by the law of England depends upon the application of the statutes and the decisions which were sought to be introduced in evidence by the defendant's counsel as to the facts presented. It appears that the ship had left the dock to finish the loading of her cargo, and to receive coal in the river where she anchored, for the voyage she was about to undertake for the port of New York, in accordance with the usual custom in such cases. A collier came alongside, was secured, and commenced coaling when the accident occurred. From the time of leaving the dock the ship was in charge of a pilot, and she was not ready for sailing until the coaling was completed.

The statutes referred to, so far as they have been presented, do not explicitly state when the vessel became subject to the control of the pilot. The rule, however, as to compulsory pilotage has been the subject of adjudication in the English courts, and none of the decisions hold, that where the vessel is at anchor and has not yet completed her loading and coaling, that the pilot has control of the ship, and the doctrine of compulsory pilotage applies. In *Rodrigues* v. *Melhuish* (10 Exch. 117), the defendant's ship left the docks of Liverpool with a pilot on board, and the plaintiff was engaged to raise an anchor of the ship which she had lost in the river; and in doing so, by the mismanagement and neglect of those on board the ship, plaintiff's boat was injured and sunk. At the time the defendant's ship was at anchor. It was held that assuming that under the Liverpool Pilot Act an outward bound vessel is bound to take a pilot on board, and, under the circumstances, the ship was not proceeding to sea at the time, and that, where damage is done by mismanagement of the vessel, the owners, to exonerate themselves, are bound to show that the accident was occasioned exclusively by the pilot's default. POLLOCK, C. B., said: "If this vessel had all her cargo on board, and the master had been ready to get on board, and she had every thing ready to commence her voyage forthwith, and left her berth with that intention, it might, no doubt, have been said that she was pro-

ceeding to sea from the time she first left her berth." And he concluded that she was not proceeding to sea and the owners are not exonerated. In the case at bar the vessel had not all her cargo on board nor her coal, and lay at anchor for the purpose of receiving a portion of the same. In *The Woburn Abbey* (38 L. J. [N. S.] 28), where the vessel was in charge of a pilot and came to anchor near another vessel, and gave her a foul berth, remonstrances being made, from time to time, by those on board such other vessel, and after a few days the vessels, in swinging to the tide, came in collision, it was held that the owners were responsible for the damage, because while the vessel was at anchor, the employment of the pilot was not compulsory, and even if the pilot had properly moored the Woburn Abbey, the master was not relieved from responsibility. The case was considered as one where the ship had been moored by the pilot for such a length of time as caused him to be *functus officio*, so far as the legal obligation to employ him was binding upon the master. In *The Maria* (1 W. Rob. 105), the owner of a foreign vessel proceeding up the river Tyne with a duly licensed pilot on board, under the Newcastle Pilot Act, was held to be responsible for damage occasioned by the default of a pilot; but it is said that in case of vessels *lying at anchor*, the taking of a pilot on board is optional with the master, but not so with a homeward-bound vessel. The same rule is also held in *Att'y-Gen'l* v. *Case* (3 Price, 302). The effect of these decisions is that where the vessel is not on its passage to or from the port, or at anchor, the law of compulsory pilotage has no application.

In the case of *The Princeton* (Eng. L. R., 3 Pro. Div. 90), a qualified pilot had been employed to pilot a ship from sea into the Mersey, but owing to the state of the tide was unable to dock her that day, and anchored in a clear berth in the river. The next day, the weather being such as to render it unadvisable to take her into dock, she remained at anchor, dragged her anchor and came in collision with a barque. It was held that the owners of the ship were not answerable for the damage, for it was occasioned by the fault of the pilot acting in charge

of the ship when the employment of such pilot was compulsory by law. The decision was put upon the ground that the ship was *in itinere* and the vessel compelled to remain where she was by *vis major*.

In all the cases cited, the real point considered was, whether the pilot was in charge under the compulsory pilot law; and unless he was so in charge, it is held that upon no principle could the owners be excused from liability. In the case at bar, the vessel was not ready for sailing; and as there was no legal obligation to employ a pilot, and he was not necessarily there, the defendant was not released from responsibility. To constitute a defense, it was essential that the pilot should have been actually and necessarily engaged in the discharge of his duty in piloting the ship out of port. Such was not the case, as we have seen, and hence the evidence was incompetent. The conclusion at which we have arrived renders it unnecessary to consider whether the defense should have been set up by answer and was only available in that form.

The rule laid down by the judge as to the damages is also claimed to have been erroneous. On this subject the judge charged that the evidence which had been offered of the sale of the goods at public auction was proper evidence to be received of the value of the goods, and said: "But still the law regards any such public sale of which notice has been given as, in itself, affording fair evidence of the value of the property sold, if not countervailed by that which is of a different character, such as a fair estimate or appraisement. Under these circumstances, the plaintiffs, if they are entitled to recover, are entitled to recover the fair market value of these goods immediately after their arrival in New York, less what was fairly realized from those sold at public sale, of which notice was given." The defendant excepted, and the judge was requested to charge that the sale at auction was not conclusive evidence of the damage value of the goods; and he added that it was not, and that he would regard it as doubtful if there were no more reliable estimate or appraisement, and that the sale at public auction, upon due notice given, is evidence of what the

damaged goods were fairly worth, in the absence of any other evidence to control it. To this qualification an exception was also taken.

The question then arises, whether the sale of the goods at auction, under the circumstances, furnishes evidence of what the goods were actually worth, or any lawful guide as to the measure of damages. In case of a sale by a sheriff, which the statute provides shall be conducted in a certain manner, the price paid is some evidence of value. (*Campbell* v. *Wood-worth*, 20 N. Y. 499; *Gill* v. *McNamee*, 42 id. 44.) This rule has also been held in reference to private sales of property. (*Wells* v. *Kelsey*, 37 N. Y. 143; *Crounse* v. *Fitch*, 1 Abb. Ct. of App. Dec. 475.)

The qualification, therefore, of the judge to the request, to the effect that it was evidence of what they were fairly worth, in the absence of any other evidence, was not strictly accurate. As, however, this exception was general and the defect not pointed out, we are inclined to think the exception was insufficient. The point is made, however, that the defendant should have had notice of the sale, so as to protect the goods from being sacrificed. There is no rule that prevents such evidence being given for want of notice of the sale. There was other evidence as to the value of the goods; and the most which could be claimed as to the evidence of the sale at auction is that it was some evidence for the consideration of the jury.

The motion to dismiss the complaint was properly denied, as the evidence of the witnesses who testified as experts tended to show negligence on the part of the defendant's officers in the management of the ship, and was sufficient to authorize a submission of the case to the jury.

The other questions raised upon the trial it is not important to examine; and for the error already stated the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except EARL, J., who did not vote.

Judgment reversed.

Statement of case.

SAMUEL ROWLAND, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondents.

Plaintiff was appointed an attendant of the Supreme Court by the board of supervisors of the county of New York, under the provision of the Code of Procedure (§ 28), requiring the "supervisors of the several counties" to provide the courts appointed to be held therein, with * * * attendants, * * * suitable and sufficient for the transaction of their business. *Held*, that he was "in office" within the meaning of the provision of the act of 1870 (§ 3, chap. 382, Laws of 1870), in reference to said county, which prohibits the board of supervisors of said county from "increasing the salaries of those now in office, or their successors; and that, therefore, an ordinance of said board increasing plaintiff's salary was illegal and void.

The intention of said act was to extend the prohibition to all persons who, under any name, were the recipients of salaries from the city treasury.

Holley v. *The Mayor* (59 N. Y. 170), *Brennan* v. *The Mayor* (62 id. 365), distinguished and limited.

Wines v. *The Mayor* (70 N. Y. 613), distinguished.

(Argued December 9, 1880; decided January 18, 1880.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made November 4, 1878, affirming a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial. (Reported below, 12 J. & S. 559.)

This action was brought by plaintiff to recover a balance of salary alleged to be due him and unpaid for his services as an attendant upon the Supreme Court in the county of New York.

The facts are set forth with sufficient particularity in the opinion.

Elliot Sandford for appellant. To constitute an officer, there must be something more than a mere employment. There should be a fixed term continuing duties and powers as well as duties. (*Olmstead* v. *Mayor*, 42 N. Y. Super. Ct. 481; 3 Wall. 93; *Sullivan* v. *The Mayor*, 48 How. 238; 75 N. Y. 42; *People* v. *Nichols*, 52 id. 485; *Costello* v. *The Mayor*, 63

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id. 50; 47 How. 491–493; *McCullough* v. *The Mayor, etc.*, 51 id. 486; *Smith* v. *The Mayor*, 67 Barb. 223; *Collins* v. *The Mayor, etc.*, 3 Hun, 680.) To bring plaintiff within the terms of the restraining clause of section 3 of the act of 1870 (chap. 382) it was necessary to show that he was a county officer. (*Whitmore* v. *The Mayor, etc.*, 67 N. Y. 21; *Jarvis* v. *The Mayor, etc.*, 49 How. 354–356; *McCluskey* v. *Cromwell*, 11 N. Y. 601, 602; *Johnson* v. *Railroad Co.*, 49 id. 462.) Plaintiff was not an officer of any kind. (*Holley* v. *The Mayor*, 59 N. Y. 165, 170; 9 Hun, 662; *Brennan* v. *The Mayor*, 62 N. Y. 365.) An appointment to an office cannot be made except by a formal writing, expressing an intent to appoint the person named, and that such appointment cannot be made verbally, unless so allowed by the statute. (*People ex rel. Babcock* v. *Murray*, 70 N. Y. 521; *People* v. *Fitzsimmons*, 68 id. 514; 62 id. 370; *Beck* v. *Sheldon*, 48 id. 365; *Putnam* v. *Hubbell*, 42 id. 106; *Andrews* v. *Raymond*, 58 id. 676; 62 id. 85; 5 Daly, 274.) Section 9, chapter 583, Laws of 1870, which gave power to the comptroller to fix the salaries of attendants appointed by him, did not take away similar power vested in the supervisors. (*Murray* v. *The Mayor*, 43 N. Y. Super. Ct. 164; *Cook* v. *Nat. Bk.*, 52 N. Y. 106; *Fisher* v. *The Mayor*, 51 id. 344; *Hankins* v. *The Mayor*, 64 id. 18; *McVeaney* v. *The Mayor*, 59 How. 106; 63 N. Y. 51.)

Chas. P. Miller for respondent. The plaintiff was an officer within the meaning of the prohibitory clause contained in the third section of chapter 382 of the Laws of 1870, and the board of supervisors were prohibited by law, on the 26th day of May, 1870, from increasing plaintiff's salary. (*Sweeny* v. *Mayor*, 5 Daly, 274; 58 N. Y. 625; *People ex rel. Henry* v. *Nostrand*, 46 id. 381; *Brennan* v. *The Mayor*, 47 How. 178; *Freeman* v. *Auld*, 14 Barb. 14; Potter's Dwarris, 203; *Henley* v. *The Mayor of Lyme*, 5 Bing. 91–107; *People* v. *Hayes*, 7 How. 248; *Rowland* v. *The Mayor*, 44 N. Y. Super. Ct. 559; Bouvier, "Office;" Burrill's Dict. "Office, MSS.;"

Wines v. *The Mayor*, 9 Hun, 659; *Holley* v. *The Mayor*, 59 N. Y. 166; *Brennan* v. *The Mayor*, 62 id. 365.) So much of section 9 of chapter 382, Laws of 1870, as authorizes the comptroller to fix the salaries of court attendants is not unconstitutional. (*Matter of Astor*, 50 N. Y. 363, 367; *Sullivan* v. *Mayor, etc.*, 47 How. 491; *Connor* v. *The Mayor, etc.*, 5 N. Y. 298.) The fact that said section has been held to be unconstitutional as to the right of the comptroller to appoint attendants does not render the remainder of the section void, unless the court is satisfied, beyond a reasonable doubt, that it cannot be supported by any reasonable intendment or allowable presumption. (Cooley on Constitutional Limitations [2d ed.], 182, 183, 184, 185; *Kerrigan* v. *Force*, 68 N. Y. 381; *People* v. *Supervisors of Orange*, 17 id. 241; *Ogden* v. *Saunders*, 12 Wheat. 270; *Fletcher* v. *Peck*, 6 Cranch, 128; *Sun Mut. Ins. Co.* v. *New York*, 5 Sandf. 14; *People ex rel. Crowell* v. *Lawrence*, 36 Barb. 177; *Talbot* v. *Hudson*, 16 Gray, 417, 422; 8 id. 21; *Wellington, Petitioner*, 16 Pick. 96; *Commonwealth* v. *Hitchings*, 5 Gray, 485; *People* v. *Hill*, 7 Cal. 103; *Robinson* v. *Bidwell*, 22 id. 386; *Maize* v. *The State*, 4 Ind. 342; *Willard* v. *People*, 4 Scam. [Ill.] 461; *Els* v. *State*, id. 498; *Mayor of Hagerstown* v. *Detrecht*, 32 Md. 369; *In re Application of the Village of Middletown*, Court of Appeals, not reported. Opinion by FINCH, J., September 28, 1880.)

DANFORTH, J. It is admitted by the pleadings that in October, 1852, the board of supervisors of the county of New York appointed the plaintiff "an attendant upon the Supreme Court, to attend upon it and to perform the duties required to be performed by him;" that he entered upon the performance of his duties under this appointment, and continued to perform them up to March 1, 1874; that in 1866 his compensation was fixed by said board at $1,200 per annum, and he has been paid at that rate up to July 19, 1872, but from June, 1870, to July 19, 1872, he received this sum "under protest." The foundation for this protest is found in the fact that on the

26th day of May, 1870, the said board of supervisors did by resolution "fix the compensation to be paid to him as such attendant at the rate of $1,500 from and after June 1, 1870;" and this action is brought to recover the difference between these two sums for the time mentioned. It is resisted upon the ground, as stated by the defendants' counsel, that the supervisors had no authority to increase the plaintiff's salary. The Special and General Terms of the Superior Court sustained this position. Its correctness is the only question upon this appeal; and this is to be ascertained by an examination of certain provisions contained in chapter 382 of the Laws of 1870. Section 3 of that act declares that "the board of supervisors of the county of New York are hereby prohibited from creating any new office or department, or increasing the salaries of those now in office or their successors." The plaintiff was appointed, it is conceded, under the provisions of section 28 of the Code of Procedure, by which "the supervisors of the several counties" were required "to provide the courts appointed to be held therein with * * * attendants * * * suitable and sufficient for the transaction of their business;" and in the language of the complaint he was, at the time of the passage of the act of 1870 (*supra*), an attendant upon the Supreme Court, "for the purpose of performing such duties as were required to be performed by him;" or, giving to those words a meaning warranted by the statute which alone permitted the appointment, he was an attendant upon the court as one necessary to it "in the transaction of its business." He was also receiving, as such attendant, compensation by virtue of the resolution of the board of supervisors. If he then held an office and received a salary, he would be within the letter of the statute. He did receive a salary — for that is only another word for compensation, stipulated to be paid for services — annual or periodical wages or pay. His mode of recompense satisfies one term of the statute. What is his position? If we accept the concise and limited definition given to it in the complaint, it is that of an "attendant upon the Supreme Court;" a court of record, of general jurisdiction, administer-

ing law and equity. He not only owes a duty to it, and is to perform such duties as are by it required to be performed, but, as we have already said, those duties are in aid of the proper business of the court, and, therefore, among others, to be present at its sittings, to execute its commands, secure due order in its proceedings, and attend upon juries, and all are as necessary as the duties intrusted to its clerks or crier. The language of the act to which he owes his appointment is somewhat different from that of the act of 1870 (chap. 408, § 11), but his duties are none the less official than those of the persons therein named, "all of whom," it declares, "shall act under the direction of the court or of the presiding justice." He owes, in like manner, a duty to it, and his employment is one in which the public are interested; its proper exercise requires capacity, diligence and attendance. Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office. However, therefore, the signification of the word used is ascertained, it will comprehend the position of the plaintiff as stated upon the record; for although his functions may be those of service, his employment is by the public, and the duties intrusted to him are official and a public charge. (*People ex rel. Henry* v. *Nostrand*, 46 N. Y. 375; *People ex rel. Kelly* v. *Common Council*, 77 id. 503, and cases cited at page 508.) But we are not to be too precise in seeking for words of definition; we may look also at the intent of the statute and so ascertain the meaning of the words used and who are aimed at as "those now in office." What was its object, and what the evil to which the prohibitory words applied? Its object was to limit or cut down expenses; and the evil was an increasing rate or scale of compensation. Its "fruit and profit," therefore, "is in its sense and spirit;" and so rendered, includes the plaintiff's case; for whether we consider the nature of the matter dealt with or its obvious purpose, it is reasonable to suppose that the legislature had in mind, when

selecting the language above quoted, all persons who, under any name, were the recipients of "salaries" from the city treasury; and in this extended sense, the words of the act should be construed. Moreover, the question presented by this appeal was answered adversely to the appellant's position in *Sweeny's Case* (58 N. Y. 625), and there has been no intention to depart from the construction there given to the statute now before us. There are incidental remarks in the opinion of ALLEN, J., in *Holley* v. *The Mayor* (59 N. Y. 170), and in *Brennan* v. *The Mayor* (62 id. 365), which, standing alone, appear to uphold the appellant's claim; but they must be read in reference to the cases then before the court, and limited to the subject-matter under consideration. They were doubtless made as illustrations, but were not necessary to the judgment in either case; nor was the point now presented, or the statute on which it turns, matter of argument or in any way involved in the decisions. The *Sweeny Case* (*supra*) was not referred to by either counsel or court and there is no reason to suppose that the remarks of the learned judge were intended to detract from the authority of that case. *Wines* v. *The Mayor* (70 N. Y. 613) was decided in favor of the plaintiff upon a construction in his favor of an act (chap. 582, Laws of 1870) later than and unlike the one in question, and does not aid the appellant.

Both upon principle and authority we think the judgment appealed from is right and should be affirmed.

All concur, FOLGER, Ch. J., concurring in result.

Judgment affirmed.

Statement of case.

JOHN G. SIBBALD, Respondent, *v.* THE BETHLEHEM IRON CO., Appellant.

The duty of a broker, employed to sell property, is to bring the buyer and seller to an agreement. While it is not essential that he should be present and an active participator in the agreement or sale when it is actually concluded, to entitle him to his commissions he must produce a purchaser ready and willing to enter into a contract on the employer's terms. He is not entitled to commissions for unsuccessful efforts to effect a sale, unless the failure is caused by the fault of the principal.

Where no time for the continuance of the contract between the broker and his principal is fixed, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith.

Where the broker has been allowed a reasonable time to procure a purchaser and effect a sale, and has failed so to do, and the principal in good faith has terminated the agency, and sought other assistance by means of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions.

Defendant employed plaintiff, a broker, to sell the steel rails of its manufacture to the G. T. R. R. Co. After various unsuccessful negotiations for a sale, carried on during a period of four months, between that company and plaintiff, during which defendant had fixed its prices several times, upon receipt of a telegram from said company, asking upon what terms one thousand tons of defendant's rails would be delivered, plaintiff telegraphed to defendant asking its lowest terms. Defendant declined to fix a price or to negotiate farther through plaintiff; and the latter thereupon telegraphed to the G. T. R. R. Co. that defendant declined to name a price. Subsequently a sale was made by defendant to said company through another broker. Upon the trial of an action to recover commissions, the court was requested to charge that defendant had the right, under the circumstances, to refuse to use the services of plaintiff if the action was taken in good faith and without intent to deprive him of his commissions. The court so charged, with the qualification, however, that defendant had no right, acting either in good or bad faith, to avail itself of what plaintiff had done, to make a sale through other agencies. *Held*, that the qualification was error; that defendant had the right to terminate the agency as it did; and, if done in good faith, plaintiff had no right to compensation although his efforts were of benefit in the subsequent successful negotiation.

(Argued December 9, 1880; decided January 18, 1881.)

APPEAL from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an

order made November 6, 1879, affirming a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial.

This action was brought by plaintiff, as broker, to recover commissions alleged to have been earned in effecting certain sales of steel rails, manufactured by the defendant, to the Grand Trunk Railroad Company.

The facts appear sufficiently in the opinion.

Albert Stickney for appellant. Plaintiff's efforts as broker having been lawfully terminated, the court erred in not directing a verdict for defendant. (*Wylie* v. *Marine Nat. Bk.*, 61 N. Y. 415, 419; *McClave* v. *Paine*, 49 id. 561; *Satterthwaite* v. *Vreeland*, 3 Hun, 152, 155; *Sibree* v. *Tripp*, 1 L. R. [C. P. Div.] 505.)

Thomas Hy. Edsall for respondent.

FINCH, J. The evidence satisfactorily shows that the defendant employed the plaintiff to sell the steel rails of the former's manufacture to the Grand Trunk Railroad Company. The existence of such a contract was strenuously denied on the part of the appellant, but the proofs establish it and leave it without substantial contradiction. The plaintiff swears that in December, 1873, he met and was introduced to Mr. Hunt, the president of the defendant corporation, and was requested by him to use the plaintiff's exertions and interest in selling steel rails of the Bethlehem Iron Company's make, and particularly to the Grand Trunk Railway of Canada, and that the plaintiff agreed to do so if he could. Hunt was afterward examined and does not contradict this statement. Indeed he almost admits it. He says, "I presume I was introduced to Mr. Sibbald in December 1873. I have no recollection of it. After my introduction to him I may have called upon him in his office in New York. He says I did, and I accept his statement up to his sale of 14th of April." Mr. Evans, in whose presence the conversation detailed by plaintiff took place, was also examined as a witness by

the defendant. He admits the meeting on that occasion; that he introduced Sibbald to Hunt as a man engaged in selling steel rails; that several railways were named as purchasers from plaintiff, "the Grand Trunk doubtless among them;" and then he adds, "I do not remember that any thing definite was said as to his selling any rails for the Bethlehem Co., but there may have been."

Upon this state of facts it is very evident that there was a general employment of the plaintiff by the defendant to sell its rails so far as he was able, and especially to the Grand Trunk Railway, with whose purchasing officers he was supposed to be in communication and to have influence. It follows that the first alleged error committed upon the trial, that the court refused a request to direct a verdict for the defendant on the ground that the plaintiff had not proved as to the transaction in suit any employment by the defendant, cannot be so regarded. The general employment was sufficiently definite and broad to have related and applied to the sale finally made, if indeed that resulted from plaintiff's influence and exertion. Nor do we see any fault in the charge of the court in this connection, that it was immaterial whether the broker was originally employed, or whether, after he had brought the thing about, the principal availed himself knowingly of the fruits of the action of the broker. This is only saying that the contract of employment may be established either by proof of an express and original agreement that the services should be rendered, or by facts showing, in the absence of such express agreement, a conscious appropriation of the labors of the broker. Indeed, the learned counsel for the defendant very fairly and justly concedes that the contract may be established in some cases "by the mere acceptance of the labors of a broker."

It follows also that there was no error in the further charge of the court, that the only remaining question was whether plaintiff was the procuring cause of the sale. Having been employed to make it, the only remaining inquiry was of necessity whether he did make it either directly, or as its efficient and producing cause. That inquiry brings up for our consideration what

the plaintiff in fact did, and what inferences are to be justly drawn from the attendant circumstances. The question, simple up to this point, grows rapidly difficult and complicated, partly by reason of the inherent uncertainty and ambiguity of the subject itself, and partly, perhaps, because of a wide range of judicial discussion not always entirely harmonious. The learned judge who tried the case at the Circuit, in his charge to the jury, realized and explained the difficulty of applying the appropriate legal rules to the particular facts of transactions like that under discussion.

It may aid, therefore, to clearness of statement and accuracy of conclusion, and perhaps remove some elements of debate, if we consider the legal attitude of a broker employed to buy or sell property, and his relative rights and duties as the basis of his claim for compensation.

The duty he undertakes, the obligation he assumes as a condition of his right to demand commissions, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although expressing the idea with many differences of phrase and illustration. The description and definition of a broker involves this view of his duty. Story says, "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation for a compensation commonly called brokerage." (Story on Agency, § 28, p. 25.) In *Pott* v. *Turner* (6 Bing. 702, 706) a broker is more tersely, and quite accurately, described as "one who makes a bargain for another and receives a commission for so doing." In *Barnard* v. *Monnot* it was said that the duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement. (16 How. Pr. 440.) In *Wylie* v. *Marine National Bank* (61 N. Y. 416) it was held that to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker. In *Moses* v. *Burling* (31 N. Y. 462) it

was declared that the authorities clearly establish the proposition that until the broker has faithfully discharged the obligation assumed in the contract with his principal, he is not entitled to his agreed commission, and that obligation is fulfilled only when he produces a party ready to make the purchase at a satisfactory price. In *Glentworth* v. *Luther* (21 Barb. 147) it was declared that commissions were earned when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at an acceptable price. It was not meant by these cases, and we do not mean, that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details. And it is to describe such instances that courts have used a different form of expression, entirely accurate in its proper application, but capable of being warped from its obvious meaning. In *Loyd* v. *Watkins* (51 N. Y. 132) the phrase used was that the broker was entitled to reward when the sale was effected through his agency as the procuring cause. And in *Lyon* v. *Mitchell* (36 N. Y. 237) the broader language is used that his efforts must have led to the negotiations that resulted in the purchase of the vessel. But in all the cases, under all and varying forms of expression, the fundamental and correct doctrine is, that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue. (*McGavock* v. *Woodlief*, 20 How. [U. S.] 221; *Barnes* v. *Roberts*, 5 Bosw. 73; *Holly* v. *Gosling*, 3 E. D. Smith, 262; *Jacobs* v. *Kolff*, 2 Hilt. 133; *Kock* v. *Emmerling*, 22 How. [U. S.] 72; *Corning* v. *Calvert*, 2 Hilt. 56; *Trundey* v. *N. Y. & Hartf. Steamboat Co.*, 6 Robt. 312; *Van Lien* v. *Burns*, 1 Hilt. 134.)

We have been thus particular in the examination and statement of the rule, because of a possible tendency, growing out

of a variety of circumstances and modified forms of expression, to give it an extent and meaning not at all intended.

It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails, if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylie* v. *Marine National Bank* (61 N. Y. 416, *supra*), in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not the sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure, therefore, and its consequences were the risk of the broker only. This, however, must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and will-

ing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. And that upon the familiar principle that no one can avail himself of the non-performance of a condition precedent, who has himself occasioned its non performance. But this limitation is not even an exception to the general rule affecting the broker's right, for it goes on the ground that the broker has done his duty, that he has brought buyer and seller to an agreement, but that the contract is not consummated and fails through the after-fault of the seller. The cases are uniform in this respect. (*Moses* v. *Burling*, *Glentworth* v. *Luther*, *VanLien* v. *Burns*, *supra*.)

One other principle applicable to such a contract as existed in the present case needs to be kept in view. Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith; not seeking to escape the payment of commissions, but moved fairly by a view of his own interest; he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot

thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor. Thus in *Satterthwaite* v. *Vreeland* (3 Hun, 152), it was held that the broker earned his commissions by making a sale on the terms fixed by the principal while the authority continued. Judge DANIELS said, and we think correctly, that "to maintain a claim by the broker for his commissions, it was necessary that he should be able to show that he had either procured a purchaser for the property at the price for which he was empowered to sell, or that the defendant had deprived him of the opportunity to do so while the privilege lasted." In that case, after the termination of the broker's authority, the principal sold to the person with whom the broker had negotiated at a less price; and it was held that he had a right to do so, unless his action was a mere device to escape the payment of commissions. Any other rule would prolong a contract with a broker indefinitely. No man could know when he was freed from its obligations, and a liability would be imposed not contained in the terms of the contract, and essentially perverting its legitimate construction.

We may now apply these principles to the facts of the present case. The plaintiff began his efforts to sell the steel rails of the Bethlehem Iron Company very soon after authority was given him. In the latter part of December, 1873, he went to Canada, and proposed to Mr. Brydges, who was managing director of the Grand Trunk Railway, to sell him the steel rails of the defendant's manufacture. Brydges declined the proposition, saying he was not then in the market, but when he was would let plaintiff know. On the fifth of January, the defendant having reduced its price and fixed it at $108 per ton, plaintiff wrote to Brydges telling him of the reduction and that the defendant offered to sell at $108 currency. At the close of his letter the broker adds, "I think a firm cash offer of $105 to $107 currency would be accepted by the Bethlehem Iron Company." This suggestion is severely criti-

cised by the appellant's counsel and with some apparent reason. The broker was bound to maintain a steady fidelity to the interests of his principal. He had no right to sacrifice the interest of the latter for the benefit of the buyer, and yet it may well be that buyer and seller could only be brought to the consent of a bargain by some moderate concession as to price, and that the broker acted fairly, in view of his talk with Hunt about a reduction, in making the suggestion which is assailed as a violation of duty. On the ninth of January plaintiff again wrote Brydges that defendant was anxious for an order, and inclined to accept a reduction. On February fifth the broker again wrote substantially the same thing. Between the twentieth of that month and the eighth of March he was in Montreal having other business for other parties and accomplished nothing. On the seventh of April he received a telegram from Brydges asking the price of one thousand tons of steel rails, "either of English or American manufacture," for immediate delivery. This seemed a hopeful inquiry. Plaintiff, after getting a price from Evans, telegraphed an offer for the defendant at $106 currency. At the same time the plaintiff wrote Brydges, repeating the offer but also transmitting offers by other parties of English rails. What that meant, and what its effect on defendant's interests was, is made plain by the further fact that no order came for the defendant's rails, but Sibbald bought for the Grand Trunk, on the 11th of April, five hundred and twenty tons, and on the 14th of April eighty tons of English rails. Meanwhile, and on the 11th of April, he caused to be sent to the Grand Trunk Railway a broken piece of defendant's rail to show the quality of the steel. On the 21st of April he wrote to Hannaford, the chief engineer of the Grand Trunk, explaining the object of sending the fractured rail, and that the defendant would roll to that company's section, and, if required, punch or bore holes round in rails.

On or about the 23d of April, 1874, plaintiff received a telegram from the Grand Trunk Railway, asking upon what terms one thousand tons of steel rails of the Bethlehem Iron Com-

pany would be delivered at Portland. On the same day he telegraphed to the defendant to know the lowest price, and stating that the rails inquired about were for the Grand Trunk. Just such an incident had occurred once before, as we have seen, and nothing had come of it. At that time a price had been named but no purchase had resulted. Was it unreasonable if the patience and confidence of the principal became exhausted? Mr. Hunt telegraphed that he would see plaintiff the next day. He did so, and in that interview declined to name a price, or negotiate further through plaintiff. On that same day the latter telegraphed and wrote to the Grand Trunk officers that the Bethlehem Company declined to name a price. This ended the agency, terminated the contract; left each party at entire liberty, if the action of the defendant was within its legal rights and exercised fairly and in good faith.

The efforts of the plaintiff had been thus unsuccessful. He had not made a bargain, he had failed to bring buyer and seller to an agreement, after having had four months of opportunity, and now his authority was terminated without his having earned commissions. Very plainly he had acquired no right to them and could acquire no right to them from any thing which might happen in the future, unless upon the sole and only ground that the defendant terminated the agency in bad faith and as a device to get the benefit of plaintiff's labors without paying for them. It is difficult to see how that could be maintained, and yet, in his charge to the jury, the trial judge called attention to the claim that on this same 23d of April, Evans, who as broker made the final sale, and who had learned on the street that the Grand Trunk Railway was in the market for steel rails, wrote that fact to the defendant and began the negotiations which ended in a sale. He did write such a letter to Hunt, but it is plain that the latter did not receive it until the 25th at the earliest, and not until after he had terminated plaintiff's agency. He could not, therefore, have been influenced by it, and the evidence of bad faith had nothing left

on which to rest except the fact of the actual sale to the Grand Trunk Railway on the 13th of May, which sale was made through Evans and his brokerage paid.

Keeping in view this state of facts, we are prepared to consider certain other alleged errors in the final disposition of the case. The court was asked to direct a verdict for the defendant on the ground that although the plaintiff had first applied to the defendant for the price of the rails, the defendant was entirely at liberty to refuse his services and make a sale itself, directly or through another broker. The request was refused. We cannot quite say that this was error in view of the possible question of bad faith in terminating the agency. Slender as may have been its foundation, there was, perhaps, enough in the circumstances of the case and the facts of the transaction to make it proper to submit that question to the jury. It was a question peculiarly within their province, and which the court could hardly be justified in withholding from their consideration.

The court was then asked to charge that the defendant, under the circumstances, had the right to refuse to use the services of Mr. Sibbald, if the action was taken in good faith, without any intent to deprive him of his commission. The proposition involved in this request was, as we have already shown, entirely accurate and sound, and should have been so presented to the jury. The trial judge, however, was unwilling to so charge without adding a material qualification. He said, "I charge that proposition, but I charge it with a qualification, that the defendant had no right to refuse to avail itself of those things which the broker had done and then, indirectly — no matter whether in good faith or bad faith — by other channels, avail itself of the efforts of the broker with whom it has declined to continue the negotiation." There was an exception both to the refusal to charge and to the qualification added.

It is apparent that the request and the charge, taken together, plainly instructed the jury two things; first, that a seller cannot, even in good faith, terminate the authority of a

broker, and effect a sale afterward through other agencies, and freed from any liability to the broker, if in the making of such after-sale the latter's previous unsuccessful efforts are in fact useful and aid and assist in the final bargain; and, second, that the circumstances of the case were such as to justify the inference that in the sale actually made the seller did in fact avail himself of the previous labors of the broker. This last proposition, without being distinctly asserted, was plainly assumed as the basis upon which the qualification of the request to charge rested and was rendered necessary. The practical result of the instruction thus given was in hostility to the conclusions we have derived from the authorities. It made immaterial the good faith of the defendant in terminating the authority of the broker, and explicitly denied such right as affecting commissions, if the after-sale was in fact aided and assisted by the plaintiff's previous unsuccessful efforts. The test of the right to recover is changed from the question of the principal's good faith in terminating the agency, to the question whether, notwithstanding that fact, the new and independent sale was helped and benefited by the previous action of the broker. The logical result of such a doctrine would be to prevent the defendant from ever making a sale of steel rails to the Grand Trunk Railway, except on condition of paying a commission to the plaintiff. For the one only useful thing which he did was to introduce the Bethlehem rails to the notice of that railway company. There could be no sale thereafter which would not be as much due to such original act of the broker as the one in question. It could always be said with equal truth that the iron company was availing itself of the fruits of the broker's labor. The doctrine asserted permits a recovery for unsuccessful efforts, for trying to effect an agreement without accomplishing one, for merely asking a purchaser to buy without getting his assent, because though the agency had ended without commissions earned, a later and independent negotiation was probably easier and more likely to succeed by reason of such previous efforts. The charge had a clear tendency to mislead the jury. Because the

broker originally brought the Bethlehem rails to the notice of the Grand Trunk purchasing officers, and thereafter accomplished nothing more than to lessen the principal's price and sell the rails of its rivals to the proposed customer, he is held entitled to recover commissions on a sale made without his intervention and after his agency had been fairly and lawfully terminated. Grant that what he did may justly be said to have aided in the making of the after-sale, yet that does not furnish ground for recovery, as we have already seen. If it did, such an agency might pass utterly beyond the principal's control. The trial judge, in the earlier part of his charge, had stated the general rule correctly, and as we hold it should be. He said to the jury, "If you find from the evidence in any given case, that the broker has failed to carry out any particular transaction, and that his efforts, although he may have introduced the parties, have terminated, and that he has not succeeded in making the trade, then the principal has a perfect right to resort to other sources for the purpose of effectuating that trade." If the charge had stopped here no error would have been committed. But it did not stop here. At its very close, and as the last words left with the jury, the doctrine, before correctly announced, is qualified by the introduction of a new and wrong element which could scarcely fail to lead the jury astray. It not only denied that unearned commissions were finally cut off by a termination of the broker's authority exercised in good faith, but confusing the essentially different ideas of an endeavor to make some sale, and negotiations about a particular sale, assumed that the last existed when the authority terminated, and on that unwarranted assumption asserted the right to commissions on the sale actually made. He should have submitted the question of good faith in terminating the agency to the jury, and told them if they found that fact, that no commissions could accrue on the after-sale, however much in making it the seller availed himself of the previous labors of the broker.

If after the broker has been allowed a reasonable time, within which to produce a buyer and effect a sale, he has

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failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions, because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts. If the charge was intended to mean this, and no more than this, the language chosen was unfortunate, for its direct tendency was to convey to the jury an entirely different idea and one with which we do not concur. For this error the judgment should be reversed.

Judgment reversed; new trial granted, costs to abide the event.

All concur; except RAPALLO, J., absent.

Judgment reversed.

GEORGE W. KIDD, Respondent, *v.* THOMAS MCCORMICK et al., Appellants.

Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase-money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral security for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. Plaintiff, before bringing this action, foreclosed his mortgages, bidding in

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the premises and obtaining judgments for deficiencies. *Held*, that neither the taking possession and completing the buildings, nor the foreclosures worked a rescission of the contract on the part of plaintiff; also that a reservation of said contract in the foreclosure judgments was not necessary.

Also, *held*, that plaintiff was entitled to recover for expenditures made after the foreclosure sales in completing the buildings.

(Argued December 10, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made December 1, 1879, affirming judgment in favor of plaintiff, entered upon a report of the referee.

This action was brought by plaintiff to reach a trust fund deposited with the Union Trust Company of New York.

On the 29th of January, 1877, plaintiff entered into a building contract with the defendants, Thomas and John McCormick, by which it was agreed that plaintiff should sell and convey to John McCormick seven certain lots of land for $2,425 each, and on each of which said John McCormick was to give back in payment for the same a bond and mortgage for that amount. The McCormicks agreed to erect a house of a certain pattern on each lot, each to be completed July 1, 1877. Plaintiff agreed to aid in the erection of these houses by making certain temporary loans, to be repaid him when the houses had reached certain stages toward completion, plaintiff agreeing upon such repayment to allow liens on each of the lots to amounts specified, the same to have precedence over his mortgages.

In pursuance of this agreement the land was conveyed to John McCormick, and bonds and mortgages for the purchase-money taken back by plaintiff. The McCormicks proceeded with the erection of the houses, plaintiff making the temporary loans called for in the agreement.

On or about May 23, 1877, the McCormicks procured a loan from defendants Charles B. and George H. Granniss of $10,000, secured by mortgages of $2,500 each on four of the lots, plaintiff having executed an instrument giving said mortgages priority over his purchase-money mortgages. It was agreed between the parties that $6,000 of the said

loan should be deposited in the Union Trust Company of New York, subject to the joint order of plaintiff and the Grannisses. Of this deposit $3,000 was to be drawn out and paid to plaintiff when the work of building had progressed to a point specified, and the balance to be so drawn out when the buildings were completed ready for occupation. The money was deposited as agreed. The McCormicks proceeded with the work, and on July 6 the $3,000 was drawn out and paid to plaintiff, out of which he repaid himself his advances, and paid the balance on the McCormicks' order. He also made further advances and accepted an order drawn on him by the McCormicks. The McCormicks proceeded with the work until about September 1, 1877, when, as the referee found, without any just cause therefor, and in violation of said contract, they abandoned the same in an unfinished condition, and declared to the plaintiff that they would not complete them. He also found that the four houses mortgaged to the Grannisses were worth, when abandoned, $2,250 less than if finished. On or about October 18, 1877, the plaintiff commenced actions to foreclose his mortgages, and on the 2d day of February, 1878, duly recovered therein judgments of foreclosure and sale, and for deficiency against John McCormick; and on the 7th day of March, 1878, each of said seven houses were sold pursuant to said judgments, and purchased by, and conveyed to the plaintiff at a price which left a deficiency. As conclusions of law the referee found that plaintiff was entitled first out of the fund to said sum of $2,250, with interest from September 1, 1877, to be applied in reduction of the deficiencies on the foreclosure sale; that defendant Bierd, who held the order so accepted by plaintiff, was next entitled to the amount thereof with interest, and that plaintiff was entitled to the residue to be applied upon the advances made by him.

F. P. Bellamy for appellants. Upon the defendants' abandonment of the building contract, plaintiff could elect to sue for damages for breach of contract or specific performance, to recover on the contract his unpaid advances then due, or he could

rescind and in an action for money had and received, recover what he had paid on the faith of the contract. (11 Paige, 427; 57 N. Y. 217; 4 Johns. Ch. 334; *Day* v. *N. Y. C. R. R. Co.*, 53 Barb. 253; *Raymond* v. *Bernard*, 12 Johns. 275.) Each of these actions is a personal one, and plaintiff is bound by his election and must stand by it. (*Day* v. *N. Y. C. R. R. Co.*, 53 Barb. 253–5; *Dubois* v. *D. & H. C. Co.*, 4 Wend. 285; *Morris* v. *Rexford*, 18 N. Y. 557; 2 Story's Eq. Jur., § 750.) The measure of damages would not exceed the cost of completing, which would put the plaintiff in exactly the same condition as if the contract had been fulfilled. (*Morrill* v. *Irving F. Ins. Co.*, 33 N. Y. 439; *Beal* v. *Home F. Ins. Co.*, 36 id. 522; *Devlin* v. *The Mayor, etc.*, 63 id. 25; *Masterton* v. *Mayor, etc., Brooklyn*, 7 Hill, 74; *Cassidy* v. *Le Fevre*, 45 N. Y. 567; *Griffin* v. *Colyer*, 16 id. 493–5; *Freeman* v. *Clute*, 3 Barb. 427.) Plaintiff's acts rendered a performance of either building contract or trust fund collateral agreement, impossible, and constituted an absolute rescission of both contracts by mutual consent. (*Dubois* v. *D. & H. C. Co.*, 4 Wend. 285; *Raymond* v. *Bernard*, 12 Johns. 275; *Terwilliger* v. *Knapp*, 2 E. D. Smith, 86; *Coon* v. *Reed*, 1 Hilton, 512; *Mallory* v. *Lord*, 29 Barb. 454; *Davis* v. *Associates of N. J.*, 6 Hun, 474; *Gallagher* v. *Nichols*, 60 N. Y. 448; *Meyer* v. *Hallock*, 2 Rob. 288; *Morris* v. *Rexford*, 18 N. Y. 557; *Lawrence* v. *Taylor*, 5 Hill, 107; *Schofield* v. *McGregor*, 1 T. & C. 404; *Utter* v. *Stuart*, 30 Barb. 20; *Weaver* v. *Bentley*, 1 Cai. 47; *Sturtevant* v. *Orser*, 24 N. Y. 538; *Fullager* v. *Reville*, 3 Hun, 600; *Day* v. *N. Y. C. R. R. Co.*, 53 Barb. 250; *Mason* v. *Boret*, 1 Den. 69; *Goss* v. *Mather*, 2 Lans. 286.) The sale at auction has fixed the liabilities of the parties so far as value is concerned, and estimated value is utterly immaterial. (20 N. Y. 499; 42 id. 40; 2 Keyes, 649.)

Thomas J. Tilney for respondent. There was no rescission by plaintiff of either the original contract or the trust fund agreement. (*Meyer* v. *Hallock*, 2 Rob. 284.)

Opinion of the Court, per FOLGER, Ch. J.

FOLGER, Ch. J. We think that the building contract and the agreement as to the trust fund are, by the acts of the parties, to be read as one contract. Then, as far as involved in this case, it was a contract by the McCormicks, to take a deed of the premises, to give back mortgages to the plaintiff, to build four houses on the lots, and to leave $3,000 on deposit at the trust company as a collateral security for the performance by them of the contract. The plaintiff agreed that his mortgages should be next in lien after the Grannis mortgage, and that he would make some advances. He has kept his agreement. The McCormicks have not completed the houses, and have failed to perform their agreement. The plaintiff has a right to resort to his collateral security, the fund; and the question is, how much of it is he entitled to, as against the McCormicks? Clearly he is entitled to have from the McCormicks as much as will put him in as good plight as he would have been had the houses been finished. His damages are the difference in the value of the premises, as they were with the houses unfinished, on the 1st September, 1877, from what the value of them would have been, had the houses been finished on that day according to the contract. *Laraway* v. *Perkins* (10 N. Y. 371) was the case of a covenant by the defendant to build a house, and by the plaintiff to convey a house and lot in payment therefor. On the trial, the plaintiff was allowed to give evidence of the difference in value between the house and lot that he was to convey, and the house to be built by the defendant. It was objected that the difference in value was not a proper measure of damages. The evidence was received under exception, and the ruling was upheld in this court. Two opinions were given in this court. They are not put in the same form, but they reach the same result. GARDINER, J., said: "The difference in value between the house and the land was the natural and necessary measure of damages." JOHNSON, J., said: "The measure of damages would be what it would be worth to build such a house. * * * It is the common case of work contracted to be done, materials to be furnished, goods to be delivered, in all which the damages are measured by ascertaining what it would have

been worth to perform." What the specific evidence given was, does not appear from the case as reported, nor from the Court of Appeals cases, bound and filed in the State Library: Vol. 35, B. No. 23. *Morrell* v. *Irving Fire Ins. Co.* (33 N. Y. 429) was a case of a building insured by defendant and burned. The defendant chose under a condition in the policy to rebuild. The court held that the policy thereby became as if a building contract. The defendant failed to complete the building. The rule of damages was laid down, as the difference in value between the building as it existed on the day it was destroyed by fire, and the building that the defendant finished and delivered over to the plaintiff (see p. 439); and that the inquiry would be, has the defendant replaced the article or rebuilt the building as agreed (see p. 453); though elsewhere in the same case it is said that the rule is: "What will it cost to procure a full completion of the contract, including, if the case calls for it, any special loss by reason of delays, etc." (see p. 447). There are analogous cases that tend to the same end. Thus, on a covenant to teach a slave a trade, the measure of damages is the additional value of the slave if taught. (*Bell* v. *Walker*, 5 Jones' Law [N. C.], 43.) A covenant to keep, or put premises in repair, seems to be an analogous case. But here the decisions do not agree. Sometimes it has been held that the measure is what it will cost to put in repair. (*Vivian* v. *Champion*, 2 Lord Raymond, 1125; *Yates* v. *Dunster*, 24 Law J. [Eng.] 226.) Other times it has been said or intimated, that the measure would be what the landlord would lose, if he put his reversion in market and sold it; in other words, the difference between what it was worth with the premises out of repair, and what it would have been with them in repair. (*Smith* v. *Peat*, 9 Exch. 161; *Luxmore* v. *Robson*, 1 B. & Ald. 584.) So it is stated, as a general principle, that where one is to receive property, then the value of the property is the measure of damages, because that is the remuneration fixed by the contract; and the principle was applied, by holding that if one agreed to build a house and give a lease of it, the value of the lease is the measure of damages for non-performance; as the consideration was the delivery of a thing

of ascertained or ascertainable value. (*Strutt* v. *Farlar*, 16 M. & W. 249.) So, on covenant to renew a lease, the value of the thing lost by non-performance is the measure of damages thereby. (*Robinson* v. *Harman*, 1 Exch. 850; *Evelyn and wife* v. *Raddish*, Holt, 543; see 7 Taunt. 410; *Tracy* v. *Albany Exch. Co.*, 7 N. Y. 472; *Holliday* v. *Marshall*, 7 Johns. 211.) I am aware that there has not been harmony in the expressions of learned judges, in passing upon the question of the measure of damages. I apprehend, however, that it has been principally in pointing out the kind of testimony by which the amount of damages was to be got at, rather than in the rule that was to govern. Stated in its broadest form, the plaintiff is to have that compensation, which will leave him as well off as he would have been had the contract been fully performed. With more particularity, he has a right to a house as good as that which the defendants agreed to furnish; and his damages is the difference between the value of the house furnished and the house as it ought to have been furnished. One kind of testimony by which that difference may be made known, is that of experts, saying what would have been the value of the one, and what is the value of the other. Another kind of testimony is that of experts, what it would cost to complete the unfinished house up to the mark of the contract. Another kind is, when the house has been in fact finished, up to that mark, what it did in fact cost to finish it. But these ways all lead to the same end; what is the difference in value between the unfinished house and a house had it been finished as agreed upon. And this is to be observed of the last-named kind of testimony; *first*, that the plaintiff is not under obligation to go on and finish the house; *second*, that he cannot always finish it, as he could not in the case in hand, at the day called for by the contract, when there will come into the damages the element spoken of by MARVIN, J., in 33 N. Y. (*supra*) of loss from delays; and *third*, that the cost of actual building may have increased after the day of performance, and so be a detrimental gauge of damage for the defaulting contractor. Yet the referee received testimony in each of these ways, and therefrom reached a result, by the application to the facts thus

before him of the rule we have above stated. We think that he made no error.

The plaintiff was entitled on the 1st of September, 1877, that there should be finished houses, rentable, and so, productive of income with which to keep down interest on the mortgages on the lots, the taxes thereon, and insurance premiums. He could not, on that day, had he been let into immediate possession and control, by any expenditure of money or energy, have completed them at once; nor, in the nature of things, could he have supplied the lack of the completed houses by a purchase in the market. The work needed to complete was one of time; and while the time was running, interest was running also, taxes were levied, insurance was to be kept up, and the premises were yielding no rent. It is plain that to repay him just what he expended to finish the buildings would not make him whole; for he had to pay, besides the cost of building, interest to Granniss, and lose interest on his own mortgages, and pay taxes and premiums. To put him in as good predicament as he would have been had the buildings been done on the 1st of September, 1877, he should have the difference in value between the buildings thrown on his hands unfinished, and the houses as they would have been if completed according to the contract. This seems to us the rule that will give him full compensation.

The appellants claim that the trust fund was not a collateral to the plaintiff's mortgages. It is true that it was not made so in direct terms, but it was collateral that the houses would be built; and as that could not be without helping the security of the plaintiff's mortgages indirectly, the trust fund operated as collateral to the mortgages. The plaintiff gave up his right to have no greater incumbrance on the lots, before his own, than to an amount named. He permitted a larger amount to precede him, but he did so on the consideration that $3,000 should be kept on deposit as a security that the houses be built, and to be paid to him when they were finished. He was, to be sure, to make advances for the building, but those advances expended on the premises made his mortgage security more valuable; and when the $3,000 would be paid

him he would reimburse himself; which makes his conduct wise and consistent in applying the first $3,000 to liquidate former advances.

We see no question of election of remedies in the case, as that question is presented by the appellants. The plaintiff had a right to enforce every agreement that he held according to its terms. His bonds he could sue and get personal judgments. His mortgages he could foreclose, if executions on those judgments were not satisfied. His claim upon the deposit he could enforce, as that deposit, in effect, stood for so much mortgage security that he had given up to Grannis for the appellants' benefit. And here is the essence of this arrangement for the deposit. The plaintiff relinquishes so much of his mortgage security, on $3,000 being put aside in place of it, for him ultimately. It mattered not to him that he made advances to the McCormicks, if the money was laid out on the lots. It was returned to him in enhancement of his mortgage value, and he would obtain repayment from the $3,000 at the end.

Nor is there room for a question of the rescission of the building contract by the plaintiff. The defendants abandoned the contract. It was the duty and the interest of the plaintiff to mitigate the damages therefrom as much as he could. To that end he took possession of the work and finished it to availability. His act in foreclosing the mortgages was justifiable. There had been a default. He need not in his action therefor, and in the judgment, reserve the building contract; the defendants had abandoned it, and it would have been a useless form to have done so.

Nor is the point tenable that the plaintiff cannot recover for expenditures made after his foreclosure sale, for that it was made on his own land. Expenditure needful to bring up the value of the buildings is part of the damage he had sustained, before the foreclosure, by the failure of the defendants to add so much to the value of the land as they agreed to do.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

JOHN GARWOOD, Respondent, v. THE N. Y. CENTRAL & HUDSON R. R. R. Co., Appellant.

Plaintiff was the owner of a mill operated by water power furnished by a creek. Defendant, who was a riparian owner above, under a claim of right, diverted the waters of the creek, conveying them by pipes to reservoirs whence its locomotives were supplied with water. The jury found, on sufficient evidence, that the water so diverted from the creek was sufficient "to perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he has sustained damage to a substantial amount. *Held*, that plaintiff was entitled to maintain an action to recover the damages sustained, and restrain such diversion.

Elliott* v. *F. R. R. Co. **(10 Cush. 191), and *Earl of S.* v. *G. N. R. R. Co.* (10 L. R. 10; Ch. Div. 707), distinguished.**

(Argued December 10, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made May 26, 1879, reversing an order of Special Term, which denied plaintiff's demand for equitable relief, and for a judgment for damages, and ordered that the action be retained as an action at law for trial by a jury upon a single question specified in the order. (Reported below, 17 Hun, 356.)

This action was brought by the plaintiff, who is the owner of a grist-mill, which is operated by the waters of Tonawanda creek, in the town of Batavia, Genesee county, to restrain the defendant from diverting the water of said stream, above the plaintiff's mill, to certain tanks and reservoirs constructed by the defendant for the purpose of supplying its locomotive engines with water, and also to recover damage for such diversion.

The cause being at issue, the court, at Special Term, ordered certain issues framed, to be tried by a jury, and they were afterward tried and a verdict rendered therein. The issues and the verdict were as follows:

First. Has the diversion of the water of the Tonawanda creek, in the village of Batavia, above the plaintiff's mill, by

the New York Central Railroad Company, and by the defendant, been of sufficient amount to perceptibly reduce the volume of water flowing in said creek, and so much as to materially reduce or diminish the grinding power of the plaintiff's mill? If yes, for what length of time was such reduction or diminution continued.

The jury answered yes to that question, and fixed the length of time at four hundred and seventy-four days.

The second question was answered in the negative, and is now unimportant.

Third. What damage has the plaintiff sustained by the diversion of the water of said creek from said mill by the New York Central railroad and the defendant? In answer to that question the jury fixed the damages at $500.

The plaintiff moved the cause for a final hearing at Special Term on the verdict, and the proof taken on the trial of the issues which the parties stipulated might be used for that purpose. Certain undisputed questions of fact of a formal character were admitted. It appeared in evidence that the water was carried from the stream to tanks or reservoirs by means of iron pipes which the railroad company had laid in the ground for that purpose, and that it was used to supply defendant's locomotives.

The cause having been heard, the court made an order directing that the demand of the plaintiff for equitable relief by way of granting a perpetual injunction, and compelling the defendant to take up its pipes, and cease to use any of the water of the stream for supplying its engines and operating its road, be denied, and adjudging that as the plaintiff failed in the chief purpose of the suit he was not entitled to a judgment for the damages assessed by the jury; and further ordering that as the question of reasonable use has not been passed upon, the action be retained as an action at law, and that the plaintiff have the right to bring the action to trial before a jury upon the single issue whether the use of the water by the defendant was reasonable. From that order the plaintiff appealed.

The General Term order directed judgment that an in-

junction issue perpetually restraining defendant from diverting the water of said creek, to the injury of the plaintiff, and that he recover the damages found by the jury. Judgment was entered accordingly.

Samuel Hand for appellant. By the common law of nature the use of water flowing in its natural channel, like the use of heat and light, is common to all, and is not the subject of exclusive property in any. (Justin., B. 2, tit. 1, § 1; Grot. B. C. 2, § 12; Puff., B. 4, C, § 52; Vattel, B. 1, C. 20, pp. 101–110; Vinius, 140, 141, 142; Brown's Civil Law, B. 2, C. 1, p. 170; Angell on Water-courses, §§ 121, 122.) In the enjoyment of this natural right the owner of the land over or through which a natural stream flows may abstract from the volume thereof for all reasonable purposes, in the manner in which such streams are usually enjoyed. (*Weston* v. *Alden*, 8 Mass. 136; *Anthony* v. *Lapham*, 5 Pick. 175; *Newhall* v. *Iveson*, 8 Cush. 595–599; *Blanchard* v. *Baker*, 8 Greenl. 253; *Arnold* v. *Foot*, 12 Wend. 331; *Embrey* v. *Owen*, 6 Exch. 368; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Mayor* v. *Com'rs*, *etc.*, 7 Barr. [Pa.] 348; *Pitts* v. *Lancaster Mills*, 13 Metc. 156.) It is only for an unreasonable use that an action is maintainable. (*Weston* v. *Alden*, 8 Mass. 136; *Colburn* v. *Richards*, 13 id. 420; *Cook* v. *Hull*, 3 Pick. 269; *Anthony* v. *Lapham*, 5 id. 175; *Evans* v. *Merriweather*, 3 Scam. 492, 496; *Union Mills & Milling Co.* v. *Ferris*, 2 Sawyer [U. S. Cir. Ct.], 196; *Wheatley* v. *Chrisman*, 24 Penn. St. 302; *Hayes* v. *Waldron*, 44 N. H. 583; *The Mayor*, *etc.*, v. *Appold*, 42 Md. 443; *The Mayor*, *etc.*, v. *Com'rs*, *etc.*, 7 Barr. 348, 367; *Carey* v. *Daniels*, 8 Metc. 476; *Embrey* v. *Owen*, 6 Exch. 368; 3 Kent's Com., § 52, pp. 439, 445; *Wood* v. *Wand*, 3 Exch. 748, 780; *Howell* v. *McCoy*, 3 Rawle, 256; *Bullard* v. *Sar. V. M. Co.*, 77 N. Y. 529; *Prentice* v. *Geiger*, 74 id. 345; Angell on Water-courses [6th ed.], § 121; *Gillett* v. *Johnson*, 30 Conn. 180; *Wadsworth* v. *Tillotson*, 15 id. 366; *Pitts* v. *Lancaster Mills*, 13 Metc. 156; *Davis* v. *Getchel*, 50 Me. 602; *Gould* v. *Boston D. Co.*, 13 Gray, 442;

Statement of case.

Merrifield v. *Worcester*, 110 Mass. 216; *City of Springfield* v. *Harris*, 4 Allen, 494; *Clinton* v. *Myers*, 46 N. Y. 511; Cooley on Torts, 585, note; *Keeney & Wood Mfg. Co.* v. *Un. Mfg. Co.*, 39 Conn. 576; *Snow* v. *Parsons*, 28 Vt. 459; *Platt* v. *Johnson*, 15 Johns. 217; *Palmer* v. *Mulligan*, 3 Caines, 313; *Dickinson* v. *Grand Junc. C. Co.*, 9 Eng. Exch. 521; *Elliott* v. *Fitchburgh R. R. Co.*, 10 Cush. 193.) As between proprietors on the same stream, the right of each qualifies that of the other, and the question always is, whether, under all the circumstances of the case, the use of the water by one is reasonable and consistent with a corresponding enjoyment of right by the other. (*Cary* v. *Daniels*, 8 Metc. 477; *Merritt* v. *Brinkerhoff*, 17 Johns. 321; *Chandler* v. *Howland*, 7 Gray, 350; *Embry* v. *Owen*, 6 Exch. 353; *Hetrick* v. *Deschler*, 6 Penn. St. 32; *Hartzall* v. *Sill*, 12 id. 248; *Pitts* v. *Lancaster Mills*, 13 Metc. 156; *Bliss* v. *Kennedy*, 43 Ill. 68; *Dumont* v. *Kellogg*, 29 Mich. 420; *Atchison* v. *Peterson*, 11 Alb. L. J. 238.)

Moses Taggart for respondent. The plaintiff has, by virtue of the conveyance to him, a legal right to the flow of the water in its natural channel or course. His right consists in the current of the stream. (2 Bouvier's Inst. 170, §§ 1610, 1611, 1612, 1613; Gale and Whateley on Easements, chap. 5, § 129; *Story* v. *Piggott*, 3 Bulst. 339; *Merritt* v. *Parker*, 1 Coxe [N. J.], 450; *Twiss* v. *Baldwin*, 9 Con. 291; *Calmont* v. *Whittaker*, 3 Rawle [Penn.], 84, 88; *Pugh* v. *Wheeler*, 2 Dev. & Bat. [N. C.] 50.) The proprietor's natural right is limited to the right to use the water for domestic, agricultural and manufacturing purposes, and he has no right to use it for any other general or useful purpose which may minister to his personal necessities or his business interests, when by such use the quantity is greatly diminished, to the damage or injury of other proprietors. (Arnold on Water-courses, 125; *Colburn* v. *Richards*, 13 Mass. 420; *Arnold* v. *Foot*, 12 Wend. 330; *Ingraham* v. *Hutchinson*, 2 Conn. 584.) The plaintiff has a legal title to the use of the water and current of the stream, and could not be deprived of

such right or title without his consent, or by due course of law, and upon payment to him of a just compensation. (2 R. S., pt. 4, tit. 7, chap. 1, § 34; 2 Bouvier's Law Dict. 646; Code of Procedure, § 642; 1 Bouvier's Law Dict. 636; Const. 1846, art. 1, § 6; *Bloodgood* v. *Mo. & H. R. R. R. Co.*, 18 Wend. 9; *Hudson River R. R. Co.* v. *Outwaters*, 3 Sandf. 689; *Gardner* v. *Trustees of Newburgh*, 2 Johns. Ch. 162; Laws of 1869, chap. 237; *Wynehamer* v. *People*, 13 N. Y. 378; *Morgan* v. *King*, 35 id. 454; *Rochester Water-works* v. *Wood*, 60 Barb. 107; *Clinton* v. *Myers*, 49 N. Y. 511; *Corning* v. *Troy I. and N. Factory*, 40 id. 191; *Olmsted* v. *Loomis*, 9 id. 423, 428; Code of Procedure, § 167; *Webb* v. *Portland Man. Co.*, 3 Sumner, 100; *Tyler* v. *Wilkison*, 4 Mason, 400; *Townsend* v. *McDonald*, 12 N. Y. 381; 2 Story's Eq., §§ 101, 926, 927; Angell on Water-courses, §§ 449, 450; *Cott* v. *Lewiston R. R. Co.*, 36 N. Y. 214; *Penn. Coal Co.* v. *Del. & H. C. Co.*, 31 id. 91; *Brown* v. *Bowen*, 30 id. 519; *Pollet* v. *Long*, 58 Barb. 20; 2 Bouvier's Inst. 174, § 610, note *b*; § 1612, note *b*; § 1613, note *b*.)

DANFORTH, J. The argument in behalf of the appellant raises no doubt as to the correctness of the judgment rendered by the Supreme Court, or its conformity to well-settled rules of law and equity. The diversion of the water is conceded; the jury have found that it was injurious to the plaintiff; he was, therefore, entitled to damages already sustained. It was continuous and under a claim of right; and to prevent further injury preventive relief was proper, for without it there would be vexatious litigation and multiplicity of suits. (Story's Eq. Jur., vol. 2, § 927; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *Swindon Water-works Co.* v. *W. & B. Canal Co.*, 7 Eng. & Irish Appeal Cas. [L. R.], 697; *Campbell* v. *Seaman*, 63 N. Y. 568.) The plaintiff has obtained nothing more; nor has the court in its decision gone beyond the issues in the action. In measuring the rights and obligations of the defendant, it was treated as a riparian proprietor, for the purpose of enjoying the powers especially granted to it, and such as might be neces-

sary to carry those powers into effect. This was proper in view of the concession by the plaintiff that the defendant was the owner of the land upon which the water was drawn. How it became such owner, whether by purchase or by proceedings under the statute (Laws of 1850, chap. 140, § 14) does not appear. The court, therefore, was not called upon to determine what the defendant's position would have been if the lands had been acquired under the statute, *supra*, and properly regarded the question as one to be determined by the law regulating the rights of upper and lower riparian owners. That law is well settled, and in defining it the authorities cited by the parties to this appeal agree. Each has a right to the ordinary use of water flowing past his land, that is, *ad lavandum et ad potandum*, for domestic purposes and his cattle, although some portion may be thereby exhausted; and this is so, without regard to the effect which such use may have upon the lower owner. The water may also be used for irrigation or for manufacturing purposes. The cases cited by the appellant are abundant to show this, but in every one the irrigation is of the land to which the right to use the water is an incident, or with which the manufacturing purpose is connected, but even this privilege cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. (*Miner* v. *Gilmour*, 12 Moore's P. C. 156; *Tyler* v. *Wilkinson*, 4 Mason, 397.) Now in the case before us the defendant has done something more; it has not been content with exercising this privilege; it has diverted a considerable portion of the stream not for any use upon the land past which it flows, but for the transaction of its business in other places and for purposes in no respect pertaining to the land itself. The pipes and reservoirs of the defendant are not laid or constructed for the mere purpose of detaining the water a short time, or applying it to machinery or other object upon the land itself, and afterward restoring it, but for facility in filling the defendant's locomotives, in order that they, with power generated from it, may pass as the interest of the defendant may require, to the east or west, returning no portion of it, even in the form of vapor, to the stream

from which it was taken. So far as the plaintiff is concerned, it has carried away from his premises the water, as effectually as if it had been turned into another channel and discharged at Albany or Buffalo; and from this, as the jury has found, he has sustained damage. Not only this, but it has been done under a claim of right by the defendant, which, if acquiesced in by the plaintiff, would in course of time ripen into a realty and destroy the incident of his property — the right of the plaintiff as riparian owner to have the water flow as it had theretofore been accustomed to flow. For in that case, although the defendant could not claim the right as riparian proprietor, it might claim it by prescription; and to prevent this result also, the plaintiff had a clear right to an injunction. The terms of the one granted are sufficiently well guarded. The defendant is "restrained" only "from diverting the water to the injury of the plaintiff." But the learned counsel for the appellant contends that inasmuch as both plaintiff and defendant require the water for artificial as distinguished from natural uses — the one as a power for mill purposes, the other as material or the means of producing power for railroad purposes, it may be abstracted by the defendant, even to the other's injury, although he concedes the rule would be different if the plaintiff required the water for natural purposes. It is difficult to see how such a distinction can be maintained. The plaintiff requires the current because its momentum supplies power. The defendant, as riparian owner, has no right to remove the water and so diminish it. If the defendant's use was for natural purposes, there might be some reason for giving it priority; but this is not pretended. To justify a use beyond that, a grant or license would be necessary. The defendant exhibits neither, but in its answer asserts that its use has been adverse to the plaintiff for more than twenty years. The evidence does not sustain the claim. As to it, therefore, the case presents no exception to the rule, that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose, to the prejudice of any other riparian owner. This is the doctrine

both of the common and civil law (3 Kent's Com. 585), and it stands upon the familiar maxim, *sic utere tuo ut non lædas alieno*. In substance the defendant's claim is, that it has a right to use all the water it pleases; but it does not show the origin or foundation of the right. As the case stands, then, the defendant has diverted the water without right and to the plaintiff's injury; its use, therefore, could not be reasonable, and the inquiry desired by the defendant, as to whether it was or not, would not be applicable. To this effect also are the cases cited in behalf of the appellant. One much insisted upon is *Elliott* v. *Fitchburg R. R. Co.* (10 Cush. 191). There, also, the defendants used the water of the stream "for furnishing their locomotive steam engines with water." The plaintiff sought to recover nominal damage, without proof of actual damage; but the court held against him, and the conclusion was that one riparian proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural water-course flowing through their lands, *unless* such diversion causes the plaintiff actual perceptible damage. It should be noticed that this was an action at law. *The Earl of Sandwich* v. *The Great Northern R. R. Co.* (L. R., 10 Ch. Div. 707) was a case in equity and upon facts, with one exception hereafter noted, not unlike those now before us. The plaintiff asked both damages and an injunction. It was held that the purpose for which the water was taken was a lawful purpose; that it was a reasonable enjoyment of the property of the defendant; that the quantity taken was not excessive, and when the quantity returned to the stream was taken into consideration, the diversion was very slight. The court says: "Is that a case in which, if there is nothing else in it, the plaintiff could ask in this court for an injunction? What injunction is he entitled to? Is there any damage done to him?" And again says: "Nothing that the defendants have done has exceeded the limits of their lawful right to deal with the water, and there is no particle of evidence to show that the plaintiffs have suffered injury, or that the right which they enjoyed and are entitled to enjoy has been in any degree invaded or interfered with by any

thing that has been done by the defendants;" and the bill was denied. Now the exception which distinguishes the cases cited from the one in hand is this: Here the jury have found, on sufficient evidence, that the defendant has so diverted the water of the creek above the plaintiff as to "perceptibly reduce the volume of water flowing therein," and "materially reduce or diminish the grinding power of the plaintiff's mill," and in consequence thereof, that he has sustained damage to a substantial amount. In the cases cited similar facts are wanting. They lie at the foundation of the one before us and are sufficient to call for the interposition of a court, whether of law or equity.

The effect and proper construction of the act of 1869 (Laws of 1869, chap. 237) or its amendment (Laws of 1877, chap. 224), conferring upon railroad corporations certain powers to take water, are not before us; for the plaintiff is not shown to have acquired any right thereunder. As the case now stands, no reason is shown why the judgment appealed from should not be affirmed, and that, I think, must be the result of this appeal.

All concur.

Judgment appealed from affirmed, with costs.

SYLVESTER McCARNEY, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

An indictment for larceny averred that the stolen property was owned by "a body corporate," the name of which was given, "organized and existing under the laws of the State of New York." On the trial the people proved the due organization and existence of the corporation named under the laws of the United States. *Held*, that the averment of incorporation under the laws of the State of New York was surplusage that need not be proved; that all that was necessary to be averred and proved was that the owner was a corporation, having the name given to it in the indictment.

It did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in planning the theft and in learning the situation of the premises and the ways of the keeper

Statement of case.

thereof. That the one who was in fact engaged in taking the property sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number, and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts. *Held*, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury.

To constitute one a principal in a felony, he must be present at its commission; his presence, however, may be constructive, and this is established when it is shown that he acted with another in the pursuance of a common design and was so situated as to be able to give aid to his associates with a view to insure the success of the common purpose.

The letter handed to the watchman, a decoy letter, was received in evidence. *Held*, no error.

A telegram was offered in evidence on the part of the people; the district attorney stated he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not by further testimony connect the prisoner with it, he "would consent that the message be stricken out." The prisoner's counsel objected that he was not then connected with it, and to the taking of it, "on the promise to strike it out." The objection was overruled. *Held*, no error, that it was a mere question as to the order of proof and within the discretion of the court.

Also, *held*, that the omission of the court on its own motion to strike out this evidence upon failure of the prosecution to connect the prisoner with it was not error; that it was for the prisoner to ask to have the evidence, if he so desired, stricken out, or to request the court to charge the jury to disregard it, and his omission to do so was a waiver of his right.

People v. *Parish* (4 Den. 153), *Furst* v. *S. A. R. R. Co.* (72 N. Y. 542), distinguished.

A witness for the prisoner was shown, on cross-examination, a copy of a telegram, and was asked if he received it. This was objected to, as having nothing to do with the trial and as immaterial. The objection was overruled. The telegram was not read or offered in evidence. *Held*, no error.

(Argued December 13, 1880; decided January 18, 1881.)

Error to the General Term of the Supreme Court, in the fourth judicial department, to review judgment entered upon an order made October 7, 1879, affirming a judgment of the Court of Sessions, in and for the county of Erie, entered upon a verdict convicting the plaintiff of the crime of grand larceny.

Statement of case.

The indictment charged the plaintiff in error with stealing twelve barrels of whisky, which were averred to be the property of the "Farmers and Mechanics' National Bank of Buffalo, then and there being a body corporate organized and existing under and by virtue of the laws of the State of New York." The further facts are sufficiently set forth in the opinion.

A. G. Rice for plaintiff in error. The variance between the indictment and proof as to the ownership of the stolen property is fatal to the conviction. (*McGary* v. *People*, 45 N. Y. 153; *People* v. *Slater*, 5 Hill, 401; *Smith's Case*, 5 City Hall Recorder, 106; Barb. Cr. Law [2d ed.], 170; 5 Park. Cr. 330; 2 Arch. Cr. Law, 257, 265–268; 2 Russell on Crimes, 787, 788, note.) To convict the defendant as a principal, it was necessary for the people to establish that he was present, or so near as to be able to direct or assist those who committed the act; that he aided, assisted, abetted, or encouraged those who acted and were present. (*Ward* v. *People*, 6 Hill, 144; Barb. Cr. Law [2d ed.], 281, 282.) The defendant might have been convicted as an accessory before the fact, but not as a principal, either in the first or second degree. (4 Park. 234; 5 id. 119; 23 How. Pr. 93.) It was error to admit the letter and the dispatches without first connecting the accused with them. (*Ward* v. *Wash. Ins. Co.*, 6 Bosw. 229; *Myers* v. *Malcolm*, 6 Hill, 292; *People* v. *Parish*, 4 Denio, 153; *Luby* v. *H. R. R. R. Co.*, 17 N. Y. 131.)

Robert C. Titus, district attorney, for defendant in error. The statement in the first count of the indictment that the corporation was "organized, and existing under and by virtue of the laws of the State of New York," is surplusage, and will be rejected. (*People* v. *Gilkinson*, 4 Park. 26; *Critchten* v. *People*, 6 Park. 370; *People* v. *Jackson*, 8 Barb. 637; 2 Leach, 186, 248; Leach's Cr. [old ed.] 113; Roscoe's Crim. Ev. 88; 1 Arch. Cr. Law, 83, note 1; *Com.* v. *Hunt*, 4 Pick. 252; *U. S.* v. *Howard*, 3 Sumn. 12; *People* v. *Davis*, 21 Wend. 309; *Johnson* v. *People*, 4 Denio, 364; *Smith* v.

State, 28 Ind. 321; 49 Cal. 342; 1 Whart. Cr. Law, § 622; *People* v. *Bransley*, 32 N. Y. 525.) To constitute one a principal, the act need not have been done by his own hand, nor is it necessary that he should be present at the commission of the offense. (1 Colby's Cr. Law, 17, 18; 1 Whart. Cr. Law, § 112; *Adams* v. *People*, 1 Conn. 173; 3 Denio, 190.) He must be present, either actually or constructively, aiding and abetting, or near and ready to render assistance should occasion require. (1 Colby's Cr. Law, 20.) It is not necessary to prove that the party actually aided in the commission of the offense, if he watched for his companion, and waited at a convenient distance. (1 Whart. Cr. Law, § 116.) Any participation in a general felonious plan, provided such participation be concerted, and there be a constructive presence, is enough to make one a principal. (1 Whart. Cr. Law, 118.)

FOLGER, Ch. J. The averment in the indictment was that the property stolen was owned by a body corporate. It named the corporation by its true corporate name. It might have stopped there; for all that is needed in an averment of ownership in a corporation is to state the fact of ownership in a corporate body, and to give the name of the corporate owner correctly. The indictment went on to aver that it was a corporate body organized and existing under the laws of the State of New York. On the trial, the people proved by documentary evidence the due organization and existence of the corporation under the laws of the United States, by the name set forth in the indictment. There was no objection made to the evidence thereof, that it was a variance from the averments of the indictment. When the people rested, the prisoner moved to quash the indictment and that he be discharged, on the ground that there was no proof that the property was in the ownership of a corporation organized under the laws of the State of New York, as was averred in the indictment. After the jury had given in their verdict of guilty, the prisoner moved to arrest judgment on the same ground. And this raises the question whether the questionable averment in the indictment was sur-

plusage that need not be proved. Allegations that need not be proved are surplusage, and may be rejected. It was necessary to prove in this case that the owner of the property was a corporation, and that it existed by the name given to it in the indictment. To establish that fact, it was not necessary to prove that it was created under the laws of the State of New York; for, as we have seen, it was fully established without. All that was needed for making out an owner of the property was proved. All was proved that was essential to have been averred in the indictment to have made a substantial and formal allegation of ownership and of the owner. Nor were the people confined to proof of an organization under the laws of this State, unless the unnecessary averment thereof, having been needlessly made, thereby became a material ingredient in the description of the owner, requisite for subsequent identification. The object of a description with certainty of an injured party in an indictment is to identify the particular fact or transaction on which the indictment has been founded. This is, that the accused may have the benefit of an acquittal or conviction thereof, if thereafter again accused for the same offense. Now, can there be any doubt, if the prisoner should be a second time accused of stealing this property, as that of the Farmers and Mechanics' National Bank of Buffalo, but that the identity of the owner, and that of the transaction, would be apparent? It seems to us that there would be none. The averment was then surplusage, that might be disregarded.

There was not proof that the prisoner was present at the warehouse from which the property was taken; or that he was in close vicinity to it. There was proof that there was a man at the warehouse that the jury might have found was the guilty taker; but it was not conclusive. They might have found that all of the immediate actors were innocent of the intent to steal. On this state of the proof the prisoner claimed that he could not be held as a principal offender, and if at all, only as an accessory before the fact. To constitute one a principal in a felony, he must be present at the commission of it. But he need not be so near as to be an eye and ear witness of

the criminal act. His presence may be constructive, and that constructive presence is made out when it is shown that he acted with another in the pursuance of a common design; that he acted at one and the same time for the fulfillment of the same preconcerted end and was so situated as to be able to give aid to his associate, with a view to insure the success of the common enterprise. A waiting and a watching at a convenient distance is enough; as if, in a case of larceny, he be placed where he may learn of the whereabouts and movements of the custodian of the property, and be prepared to lure him away, or to retard him, or to give timely warning of his approach. Now there was proof here tending to show that the prisoner had part in planning the theft, and in spying out the lay of the premises where the property was stored, and in learning the ways of the keeper of them. It was in proof that one who was in fact engaged in the taking of the property sent the porter of the warehouse to the home of the keeper of the goods with a letter, and promised the porter a reward on his calling, after the delivery of it, at a given number and street. On his reaching that street, and in quest of that number, he met the prisoner, who spoke to him, and they conversed of the keeper and his whereabouts. (*Com.* v. *Lucas*, 2 Allen, 170; *Com.* v. *Knapp*, 9 Pick. 496.) The proof is not strong to show that he lay in wait to aid or to warn. It was enough, however, to go to the jury, in connection with the testimony as to his preconcert in the plan and his aid in the prior arrangement. It was enough to give legal warrant to an inference by them that he was at the place to which the porter had been directed, with the purpose of learning of the whereabouts and movements of Neff, the warehouseman, and of acting upon the knowledge thus got, as would best aid his comrade either to succeed or to fly, and that the latter was aware of that support in the undertaking. The court was not called upon to say to the jury that there was no proof for their consideration of facts that if established would make him a principal in some degree.

We think that the Watson letter was properly received in evidence. It came from the hand of one of the men who took

away the property. It was plainly a deceptive or decoy letter. It tended strongly to show that the taking of the property was feloniously intended. It was one of the acts that were done at the time of the taking, serving to characterize the transaction. Had the man who sent the watchman with it sent by oral message the same words that the letter contained, that message would have been as admissible as was his request for the letter to be carried. That it was written, made no difference in its competency as evidence of intent. Proof of the taking was competent, though the prisoner was not present assisting in the act, and though other proof was needed to connect him with it. So proof of an act concurrent with the taking, and competent to show the intent thereof, was competent against the prisoner, though other proof was needed to connect him therewith.

A telegraphic message was taken in evidence without then or afterward connecting the prisoner with it. When it was offered by the people, the district attorney stated that he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not by further testimony connect the prisoner with it, he "would consent that the message be stricken out." The prisoner objected, on the ground that the prisoner was not then connected with it, and to the taking of it "on the promise to strike it out" on failure to connect the prisoner with it. Thus the matter stood at the trial. We must take the place of the trial court at that stage of the proceedings, to determine whether it was in error in receiving the paper. Of course, if the district attorney had brought other proof that did connect the prisoner with the message, there would be no merit in the exception. He alleged that he could. Now if he had it in his power to do it, and the court knew that he had, it was a mere question of the order of proof, whether he should connect the prisoner with the message first, and prove the sending of it afterward, or *vice versa*. As the court did not know it, had it not the power to take the assertion of counsel that he expected to supply the link that would fasten to the prisoner? And was it not then also a mere question of

order of proof? When it can be made to appear that other proofs will probably be given which will make the questioned evidence material, the court, in the exercise of discretion regarding the order of proofs, may allow an inquiry to be made. (Per WOODRUFF, J., *Cass* v. *N. Y. & N. H. R. R. Co.*, 1 E. D. Smith, 525.) The court need not at once exclude relevant testimony because it does not at once establish the issue to which it relates. (Per ROBERTSON, C. J., *Murphy* v. *Boker*, 28 How. Pr. 263. See, also, *Chapman* v. *Brooks*, 31 N. Y. 88.) An ancient will may be read in evidence without proof of its execution, if there has been a possession under it of thirty years. Yet it is in the discretion of the judge to permit the will to be read as an ancient will before the needful possession under it has been proven. (*Doe* v. *Passingham*, 2 Carr. & Payne, 440, cited per ALLEN, J., in *Staring* v. *Bowen*, 6 Barb. 115.) Fraud in a vendor, to affect the vendee, may be proved before knowledge and concurrence in the fraud by the vendee is shown, though both be necessary to affect the latter. (*Cotton* v. *Haskins*, Litt. Sel. Cas. 151, 152.) A sworn copy of a deed, or other secondary evidence, on the ground of loss, may be received without waiting for proof of existence or execution. (*Allen's Lessee* v. *Parish*, 3 Hammond [Ohio], 107.) And though the court know not, as seldom can it know, that the needful connecting proof will be forthcoming, may it not rest for awhile on the assertion of reputable counsel of his expectation that he can produce it? And is it not then also a mere question of the order of proof? That a court may base its action upon the avowals and declared purposes of counsel is shown by *Dunn* v. *The People* (29 N. Y. 523). It seems to us that it would too much hamper the trial courts in their proceedings, if they were much restricted in the exercise of a discretion in the order in which proof should be received. There must be a discretion rested in them, in such case, for the convenience and dispatch of business, and often for a proper understanding and appreciation of the testimony. As was said by NELSON, C. J., in a kindred matter, in *Morris* v. *Wadsworth* (17 Wend. 103, 119), the question must always depend so

much upon the exercise of a sound discretion that it would be unsafe to lay down any general rule for the disobedience of which an exception should be allowed. (See, also, *Flynn* v. *Murphy*, 2 E. D. Smith, 378; *Phil. & Tr. R. R. Co.* v. *Stimpson*, 14 Peters, 463, per STORY, J.) Truly it is at times, as it was here, a delicate discretion; to be used with sound judgment and great care for the case of the prisoner, lest he be jeoparded with the jury by testimony that may never properly have a place in their consideration. And it may be well often to doubt whether the zeal of counsel does not lead to an expectation of forthcoming connecting testimony, when it does not exist. We are not able to see error in the taking of this message in evidence, under the circumstances shown. The prisoner further claims that it was error in the court that it did not, on its own motion, strike out this testimony, when it had become apparent that the message was not connected with the prisoner. It might be a sufficient though a technical answer to this claim, that there is no direct exception that raises this point. But we will not rest it there, for the argument of the prisoner is, that the ruling in of the message over his objection, on the assertion of the district attorney, put the duty on the court, of itself, after his failure to connect it with the prisoner, to free the case from the objectionable proof. In putting this argument he mistakes in stating the occurrence at the trial; saying that the district attorney, and by implication the court, promised to strike out the testimony on failure to connect it. This is stronger than the fact. The error-book shows that the district attorney's pledge was, that he would consent that it be stricken out. There being no error in receiving the message at first, as a discretionary direction of the order of proof, that it should be stricken out afterward if not made material, was a right of the prisoner which he might ask for or waive. It was a privilege not to be denied to him, nor the use of it to be forced upon him. It was for him to call upon the court to put the case right before the jury, by striking out the testimony, or by charging them to disregard it. There is doubtless a general duty upon a trial court to see that a prisoner has his rights before it;

but when he appears with skilful counsel to aid him, it is not error to suppose that all will be done in his behalf that caution and ingenuity can suggest, and the court is not called upon to watch that no lapse like this takes place. A passive course, that does not refuse a motion or request of the prisoner, is not the committal of error. The party against whom such testimony is introduced is protected against prejudice by his right to call on the court to instruct the jury to disregard it. Where he fails to do this, the court may assume that he does not think it of importance enough to need that caution. It is no ground of complaint, in such case, that the court has not volunteered to warn the jury, nor a reason for a new trial, on the ground of an oversight. (28 How. Pr., *supra.*) We think that it was the duty of the prisoner, if he deemed the immaterial testimony damaging to him, to call upon the court for affirmative action. What was said in *The People* v. *Parish* (4 Den. 153), is not applicable here, for three reasons. *First.* It was *obiter*. *Second.* It does not appear that there was an assertion at the trial that connecting proof would follow. *Third.* At bar the connecting proof suggested was that of a conspiracy; and it is a rule of stringency that there must be proof of a conspiracy before the declarations of a co-conspirator can be taken against one on trial for that offense. Yet that rule has some times been made to yield to the other, that the order of proof is in the discretion of the court. (*Comm.* v. *Boyer*, 2 Wheel. Cr. Cas. 140.) Nor is *Furst* v. *Second Ave. R. R. Co.* (72 N. Y. 542) on a parallel. There improper evidence had been received, and the defendant had excepted. It was improper to receive it when it was received; and nothing that accompanied the reception of it cured the error or held it in abeyance. The defendant had secured a technical advantage on the trial that might enable him to change an adverse result. The offer of the plaintiff to have the answer stricken out — the court making no ruling upon that offer — put no duty upon the defendant to accept, and abandon his exception or to ask a ruling from the court. It differs from the case in hand, because there the evidence was never properly received, the action objected to was always er-

roneous, and there was no duty upon the defendant to seek the correction of it, or to accept it on the proffer of his adversary.

When Thomas Glenn — who was called and testified as a witness for the prisoner — was under cross-examination, a copy of a telegram was shown to him, and he was asked if he received it. Objection was made that it had nothing to do with the suit and was immaterial. The telegram was not read or offered in evidence. The only fact put in evidence was that the witness had received it. We do not see that the fact had direct bearing upon the case of the prisoner. But it was asked for on the cross-examination of a witness who had been under arrest on supposition of complicity in the larceny, and on whose examination the prisoner had been a witness. Latitude may be allowed in the cross-examination of a witness, and as no use of the fact was afterward made or suggested, we do not see that it was error to receive it.

These are all the allegations of error presented to us by the plaintiff in error. None of them are fatal to the judgment, and it should be affirmed.

All concur.

Judgment affirmed.

JOHN HOPE, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment.

It is not a proper plea, therefore, to an indictment that the grand jury received incompetent and irrelevant evidence, to wit: the *ex parte* affidavits taken before the committing magistrate.

It seems that allegations that a grand jury received and considered such affidavits would not be sufficient to sustain a motion to quash the indictment, in the absence of averments or proof that the affidavits were the only evidence, or that some fact material to the case of the prosecution was established thereby, or that the witnesses by whom the affidavits were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence.

Statement of case.

Where an indictment contains several counts, some of which are good, the fact that some of the counts are bad does not make a conviction erroneous where the verdict is general.

Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention to return the keys, or that the street door key was ever recovered. *Held*, that the evidence justified the jury in finding a felonious taking of the key from W. against his will and in his presence by violence to his person and by putting him in fear of immediate personal injury, and that such a finding established robbery in the first degree (2 R. S. 677, § 55); that the intent with which they took the key was a question of fact for the jury, and if they found that the robbers took it with intent to appropriate it, the use subsequently made of the key although in the minds of the robbers at the time of the taking could not affect the question of their guilt; and that it was immaterial whether the robbers formed the plan of taking the key before they entered the room or whether it was an after-thought suggested by seeing it on the table.

Also, *held*, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery.

Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial.

Also, *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank.

(Argued December 18, 1880; decided January 18, 1881.)

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment entered upon an order made December 30, 1879, affirming a judgment, entered upon a verdict, convicting the plaintiff in error of the crime of robbery in the first degree.

The indictment contained four counts, each charging the

Statement of case.

plaintiff in error with feloniously assaulting one Louis Werckle and robbing and taking from him "one key of the value of one dollar." The first count charged the taking to have been "from the person of said Louis Werckle and against the will and by violence to the person." The second count charged the taking to have been "in the presence of the said Louis Werckle against the will * * * and by putting the said Louis Werckle in fear of some immediate injury to the person. The third count charged was similar to the first, but averred that the key was the "personal property of the Manhattan Savings Institution." The fourth was similar to the second, with the averment of ownership contained in the third. The facts are sufficiently set forth in the opinion.

Charles W. Brooke for plaintiff in error. There was not sufficient proof that there was a felonious taking of the property charged in the indictment. (3 R. S. [6th ed.], § 69; *State* v. *Trexler*, 2 Car. L. R. 90; *R.* v. *Macauley*, 1 Leach, 287; *R.* v. *Baker*, id. 299; *R.* v. *Steward*, 2 East's P. C. 702; *R.* v. *Walls*, 2 C. & K. 214; *R.* v. *Grosel*, 1 C. & P. 304; *R.* v. *McDaniel*, Foster, 121–128; *Lang* v. *State*, 12 Ga. 293; 2 East's P. C. 662; Roscoe's Cr. Ev. 894; *R.* v. *Cunup*, 1 C. & P. 658; *R.* v. *Cabbage*, R. & R. 292; *State* v. *Cornell*, 1 Tenn. 305; *Comm.* v. *Leach*, 1 Mass. 59; *People* v. *Smith*, 5 Cowen, 218; *State* v. *Wheeler*, 3 Vt. 344.) The court erred in admitting evidence of the burglary as *res gestæ*, it having occurred subsequent to the robbery charged in the indictment. (*People* v. *Hopson*, 1 Denio, 575; *Bottomly* v. *U. S.*, 1 Story, 105; 2 Russ. on Crimes, 777; *R.* v. *Roebuck*, 36 Eng. L. & Eq. 631; 1 Greenl. on Ev., § 53; *Dunn* v. *State*, 2 Pike, 229; *People* v. *Wood*, 3 Park. 681; *Nutting* v. *Sage*, 4 Grave. 584; *State* v. *Griffis*, 3 Ired. 404; 1 Arch. Cr. Pr. & Pl. 392; *R.* v. *Dossett*, 2 C. & K. 306; *R.* v. *Voke*, R. & R. 531; *Comm.* v. *Wilson*, 2 Cush. 590; *Brock* v. *State*, 26 Ala. 104; *Thorp* v. *State*, 15 id. 749; *Comm.* v. *Call*, 21 Pick. 515; *Farrar* v. *State*, 2 Ohio [N. S.], 54; *Stone* v. *State*, 4 Humph. 27; 1 Phil. on Ev. 178 [2d ed.]; *R.* v. *Vandercomb*, 2 Leach's Cr. C. 816; *U. S.* v. *Mitchell*, 2 Dall. 357; *Rex* v. *Westwood*, 4 C.

Statement of case.

& P. 547; *Tuttle* v. *People*, 36 N. Y. 431; 1 Phil. on Ev. 169, § 3.) In cases of conspiracy, when once the conspiracy or combination is established, the act. or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act or declaration of all, and is evidence against all. (*U. S.* v. *Harman*, 1 Bald. 292; *Martin* v. *Comm.*, 11 Leigh, 745; *U. S.* v. *Goodwin*, 12 Wheat. 469; *Waterbury* v. *Sturtevant*, 18 Wend. 353; 1 East's P. C., chap. 2, § 37, p. 96; 2 Stark. Ev. 326.) When the common enterprise is at an end, whether by accomplishment or abandonment, no one is permitted by any subsequent act or declaration of his own to affect the others. (1 Phil. & Am. on Ev. 215, n. 4; 1 Greenl. on Ev., § 3; *U. S.* v. *White*, 5 Cranch's C. C. 38; *R.* v. *Turner*, 1 Mood. Cr. Cas. 347; *R.* v. *Appleby*, 3 Stark. 33; *Melen* v. *Andrews*, 1 M. & W. 336; *Hunter* v. *Comm.*, 7 Gratt. 641; *State* v. *Poll*, 1 Hawks, 442; *State* v. *Hanney*, 2 Dev. & Bat. 390; *Kirby* v. *State*, 7 Yerger, 259; *Morrison* v. *State*, 5 Ohio, 439; *Lowe* v. *Botteler*, 4 Har. & McHen. 349; *R.* v. *Salter*, 5 Esp. 125; *R.* v. *Roberts*, 1 Campb. 399.)

Daniel G. Rollins for defendant in error. If there were misconduct in the grand jury, the plaintiff's remedy was by motion to quash, not by a plea in abatement. (*People* v. *Hulbut*, 4 Denio, 133; *State* v. *Boyd*, 2 Hill [S. Car.], 288; *U. S.* v. *Reed*, 2 Blatchf. 435; *Turk* v. *State*, 7 Ohio, 240; *State* v. *Dayton*, 3 Zabr. 49; *Spratt* v. *State*, 8 Mo. 247; *Rex* v. *Dickinson*, Russ. & Ry. 401; *Reg.* v. *Russell*, Car. & M. 247.) There was evidence to support a finding of a felonious taking of the key. (3 R. S. [6th ed.] 951, § 60; *Rex* v. *Bingley*, 5 Carr. & P. 602; *Reg.* v. *Morris*, 9 id. 349; 2 Bishop's Cr. Law, §§ 843–7; *Reg.* v. *Jones*, 1 Den. C. C.; 2 Car. & K. 236; *Rex* v. *Morfit*, Russ. & Ry. 307; *Rex* v. *Cabbage*, id. 292; *Hamilton* v. *State*, 35 Miss. 214; *State* v. *Brown*, 3 Strobh. [S. Car.] 508; *State* v. *Ware*, 10 Ala. 814; *People* v. *Juarez*, 28 Cal. 380; *Reg.* v. *White*, 9 Car. & L. 344; *Reg.* v. *Wynne*, 1 Den. C. C. 365.) The testimony relating to the robbery of the bank while the three masked and armed rob-

bers stood guard over Werckle, gagged and bound, was properly received. (1 Bish. Cr. Pro., § 1067 [2d ed.]; *Heath* v. *Comm.*, 1 Rob. [Va.] 735; *Higgins* v. *State*, 7 Ind. 549; *Burr* v. *Comm.*, 4 Gratt. 534; *Rex* v. *Long*, 6 Carr. & P. 179; *Rex* v. *Fursey*, id. 81; *Rex* v. *Rooney*, 7 id. 517; *Comm.* v. *Hale*, 3 Gratt. 593; *State* v. *Gillis*, 4 Dev. 606.) The evidence of things said and done by other conspirators in the absence of the prisoner, some of them before he became a party to the conspiracy, was properly received. (3 Greenl., §§ 93–94; *Collins* v. *Comm.*, 3 S. & R. 220; *State* v. *Soper*, 16 Me. 293; *Aldrich* v. *Warren*, id. 465; *Reg.* v. *Shellard*, 9 C. & P. 277; *Reg.* v. *Blake*, 6 Q. B. 126; *Rex* v. *Stone*, 6 T. R. 527; *U. S.* v. *Cole*, 5 McLean, 513; *Comm.* v. *Timon*, 8 Gray, 375; *Cornelius* v. *Comm.*, 15 B. Mon. 539; *Malone* v. *State*, 8 Ga. 408; *Gardner* v. *People*, 3 Scam. 83; *Reg.* v. *Murphy*, 8 Car. & P. 297.)

RAPALLO, J. The demurrer to the special plea interposed on behalf of the prisoner was properly sustained. The substance of the plea is, that the grand jury, by whom the indictment was found, did not proceed in accordance with law, but considered, regarded and examined improper, incompetent and irrelevant matters, and the specification is that they had before them for their consideration, and as part of their method of inquiry, and did consider certain *ex parte* affidavits taken before a police justice in an examination had before him as such, together with the examination of the prisoner, taken in accordance with the statute.

We find no authority for the position that the sufficiency of the evidence upon which an indictment is found by the grand jury is a question which can be raised by plea to the indictment, or that the reception of incompetent or irrelevant evidence by the grand jury can be pleaded. *People* v. *Hulbut* (4 Den. 133) is to the contrary, and no case has been cited in support of the plea. The counsel for the prisoner claims that the plea should be considered as a motion to quash. No such motion was made, but the plea was argued on demurrer, and the judgment over-

ruling it was clearly correct. Moreover, it does not state facts which would be sufficient, even on a motion, to require the court to quash the indictment. It does not aver or show that the *ex parte* affidavits were the only evidence before the grand jury, nor that the witnesses by whom they were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence, nor does it contain the very essential averment that any fact material to the case of the prosecution was established by such *ex parte* affidavits, nor does it show that the prisoner was in any manner prejudiced by their being before the grand jury. All that appears on the face of the plea is that the preliminary affidavits and examination taken before the committing magistrate pursuant to the statute were placed before the grand jury as a part of their method of inquiry, and were considered by them. There is nothing to show that the grand jury made any improper use of these examinations or did not proceed according to law. The statute makes it the duty of the magistrate before whom an offender is brought for examination, to certify all examinations taken before him, to the court having cognizance of the offense and in which the prisoner may be indicted, on the first day of its next session (2 R. S. 733, §§ 21, 26); and one purpose of this requirement, doubtless is that these papers may be laid before the grand jury to aid them in their investigation of the case. We are not aware that it has ever before been claimed that placing these papers in the hands of the grand jury vitiated an indictment.

The next point urged in behalf of the prisoner is, that the third and fourth counts of the indictment are bad, and that the court erred in not excluding all testimony offered in support of them and in not directing the acquittal of the prisoner.

The objection made to the third and fourth counts is that the key taken is therein alleged to have been the property of the Manhattan Savings Institution, and to have been violently and feloniously taken, as alleged in the third count, from the person of Louis Werckle against his will, and by violence to his person, and as alleged in the fourth count, to have been violently and feloniously taken in the presence of Werckle,

against his will and by putting him in fear of immediate injury to his person, and it is claimed that to constitute a valid indictment for the offense of robbery in the first degree under the statute (2 R. S. 677, § 55), it must be averred that the property was feloniously taken from the person or in the presence *of its owner*, and against *his* will by violence to *his* person, or by putting *him* in fear of some immediate injury to his person. That therefore an indictment averring the taking of the property of one person by committing violence upon, or putting another person in fear, etc., is not good; and further that the offense of robbery in the first degree cannot be committed upon a corporation, as violence cannot be committed upon the person of a corporation, nor can it be put in fear of injury to its person. The sufficiency of these counts is claimed by the prosecution to be established by the case of *Brooks* v. *People* (49 N. Y. 436), but we do not think it material now to examine the question. In all the counts the robbery is alleged to have been committed upon Werckle. The first and second counts, which lay the property in him, are conceded to be good. Even if the others were bad, that would be no ground for directing an acquittal of the prisoner on the whole indictment, and an acquittal specially on the third and fourth counts would be of no importance, so long as he was convicted upon the good counts, the robbery being the same, and the only difference between the counts being in the allegation of ownership. On the question of evidence no point arises, for there was no evidence specially objected to as inadmissible under the third and fourth counts, nor was any offered or received specially in support of those counts, nor was any evidence received which, if competent for any purpose, was not competent to sustain the good counts. Nor is the conviction rendered erroneous, the verdict being general, merely by reason of there being bad counts in the indictment, provided some of the counts are good. Whether the prisoner is found guilty or acquitted on the bad counts in such a case is matter of no importance; though the bad counts describe no offense, his conviction upon the good counts is not impaired, and he would be

in no better condition if the court had on the trial withdrawn the bad counts from the consideration of the jury. We express no opinion, therefore, as to the sufficiency of the third and fourth counts.

It is further urged on behalf of the prisoner that the offense of robbery was not made out, because the keys were not taken *animo furandi*, or with the intent to deprive the owner of the property or to convert it to the use of the robbers, but that they only wanted the temporary use of the keys to enable them to enter the bank and rob the safe. Also that the violence was committed for the sole purpose of extorting from Werckle the combination of the safe, and not for the purpose of obtaining the keys.

Although the intent with which the robbers entered Werckle's room is not controlling, we think the evidence was sufficient to justify the jury in finding, if necessary, that they designed to obtain the keys as well as the combination. It was shown that they took the keys from his table, in his presence, and the evidence was sufficient to warrant a finding that this was done against his will and by putting him in fear of immediate injury to his person, as well as by disabling him from making the resistance which he doubtless would have made to their asportation had he been free, and not in fear. He testified that when they took the keys they had entered his room masked, while he was in bed, and had throttled, suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him in such a state of terror as to be incapable of resistance. That they then took the keys from a table in his presence, one of them being the key to the street door of the bank. That having thus possessed themselves of the keys, they carried them off and never returned them, and there is no evidence of any intention to return them, or that the street door key has ever been recovered. This evidence was ample to justify the jury in finding a felonious taking of the keys from Werckle against his will and in his presence, by violence to his person and by putting him in fear of immediate injury to his person, and such a finding

establishes the charge of robbery in the first degree. (2 R. S. 677, § 55. The intent with which the property was taken was a question of fact for the jury. It cannot surely be a defense in law that the gang afterward used the keys, or any of them, in the commission of the further crime of despoiling the bank. If a servant should be attacked by robbers on the highway and a key should be taken from his person by force and carried off by his assailants, it could not be tolerated that the fact that they afterward used the key in feloniously entering the house of the servant's master, should be held to constitute a defense to the charge of robbery; nor would the jury be bound to find as matter of fact, that their sole intent in taking the key was to use it for the purpose of entering the house, and then to restore it. If they forcibly took the key, intending to appropriate it, and did appropriate it, the use which they afterward made of it, even if in their minds at the time of the taking, cannot affect the question of their guilt, and it was for the jury to say whether they intended to appropriate the keys to their own use.

It was not important whether the robbers formed the plan of taking the key before they entered the room, or put Werckle in a state of fear, or whether it was an afterthought suggested by seeing it on the table. If they availed themselves of the state of terror in which they had put Werckle, in extorting from him the secret of the combination, to enable them to take the key also, that was sufficient. Should robbers attack a traveler with the intent of robbing him of a sum of money which they supposed he had about him, and put him in fear for that purpose, and while he was in that condition they should find upon him a watch which they did not previously know that he had, and availing themselves of his condition should take the watch, can it be doubted that they could be convicted of robbing him of the watch? The question of the felonious taking of the key was submitted to the jury in the manner most favorable to the prisoner. The court charged, at the request of the prisoner's counsel, that in order to convict, the jury must find that the prisoner took the key with the intent to convert and appropriate it to his own use; that his guilt

of the burglary would not justify his conviction of the robbery; that if the jury entertained any doubt as to the intent to take and permanently appropriate the key, they must acquit, and that if it was not feloniously taken, originally, it not being returned, would not make out a felonious taking.

Numerous exceptions were taken on the trial to rulings of the court in admitting evidence of the burglary committed on the bank and the breaking open of the safe, and the larceny of the valuables therein. This evidence was admissible for the purpose of showing that the prisoner was one of the gang who committed the robbery of the key. At the time of that robbery they were all masked, and could not, therefore, be directly identified, but it was competent to show that a burglary was committed on the bank on the same occasion, and that the gang who committed the burglary were the same who committed the robbery, and thus by connecting the prisoner with the burglary, to connect him also with the robbery. It is true as a general rule, that on a prosecution for one crime it is not proper to prejudice the jury against the prisoner by showing him to have been guilty of another; but where the evidence is relevant and material on the question of the guilt of the prisoner of the crime for which he is upon trial, it cannot be excluded merely because it also proves him guilty of another crime.

The circumstances on which the prosecution relied, in part, to establish the prisoner's participation in the robbery committed on Werckle, were, that on the same morning, and immediately after the attack upon him, and the taking of the key, and while three of the gang remained in his room and stood guard over him on the second floor, the others went down stairs and entered the bank by means of the key, and forcibly opened the bank-safe with burglars' implements. That the prisoner was seen near the bank building about half an hour before Werckle's room was entered, and also about twenty minutes afterward, and that while Werckle was under guard up stairs, and the opening of the safe was going on in the banking room down stairs, the milkman, who served Werckle's

family with milk, came to the street door, leading to Werckle's apartments, and made the usual signal, and the prisoner came out of one of the doors leading from the banking-rooms to the street, and told the milkman that the family had gone to the country, and wanted no milk.

Having thus given evidence tending to show that the prisoner was on the premises while the robbery of the bank was going on, the prosecution sought further to connect him with the gang engaged in the crime, by showing his previous complicity with them in a scheme to enter and rob the bank. On this line of inquiry the most serious questions in the case arise.

Patrick Shevlin, who had been employed as watchman of the bank on Sundays for several years, and occasionally went there evenings during the week, testified that on the night before the robbery, viz.: Saturday night, the 26th of October, at about a quarter-past eleven o'clock, two men came to the weather door of the bank and made a signal to him, which had been preconcerted between him and them, and signified that they wished him to let them in. These men were Jimmy Hope and Big Pete. It appears in the case and in the points of the counsel for the prisoner, that Jimmy Hope is the father of the prisoner, John Hope. Shevlin testifies that he did not let them in, but went out and met them in the street, and there were there also one Abe Coakey and the prisoner, and another man known as Brooklyn Jimmy, whom the witness had on the night of the previous Monday seen in company with the prisoner in the vicinity of the bank. He also testified to having seen all these persons, either together, or in proximity to each other, in the street near the bank, on the nights of Monday and Thursday next preceding the robbery, and his testimony tended to show that they were associated together.

The prosecution was then allowed to show by this witness, that for upward of two years a conspiracy had been on foot to rob the bank; that Jimmy Hope was the leader, and had opened the subject to the witness, and it had been agreed between them that witness should let him into the bank so that he

might break into the safe; and, in fact, witness had, on two occasions before the robbery was consummated, let Jimmy Hope into the bank on Sunday, and attempts had then been made to open the safe, which were unsuccessful; that in the beginning other persons were concerned with Hope in the scheme, but he had changed his associates; that the consultations between Jimmy Hope and the witness on the subject of robbing the bank were very numerous, and continued at intervals down to the night before the robbery, when Jimmy Hope, and his son the prisoner, and the other persons named, were hovering about the bank, and the signal was given by Jimmy Hope to the witness to be admitted into the banking-room, and the testimony tends to show that it was intended at that time to consummate the scheme, but that Shevlin did not perform his part; he assigning as the reason, his fear that the night-watchman, who was then in the bank, would be murdered if the thieves were admitted at that time:

We think that all this evidence was properly received for the purpose of showing that a scheme to rob the bank had been and was on foot, in which Shevlin and Jimmy Hope and others from time to time participated, and that the prisoner had become a party to it, and that his presence there on the next morning, Sunday, when the crime was consummated, was not accidental or innocent, but that he was one of the persons engaged in the criminal transaction, and thus to connect him with the robbery of the key, which was evidently committed by the same persons who broke into the safe.

The numerous exceptions taken to evidence of the condition of the bank and the safe after the robbery, and of the stealing of the securities from the safe, are covered by what has already been said. It was properly admitted for the purpose of showing that a burglary had been committed on the bank while the prisoner was there, and to confirm the theory of the prosecution, that the prisoner was one of the burglars, and consequently one of the gang who committed the robbery upon Werckle.

We find no error in the admission of the evidence as to

what occurred in the presence of the prisoner after his arrest in respect to his identification, and the manner of his identification.

We have examined the charge and the various requests and refusals to charge, and are of opinion that no error was committed in these respects. As to the intent with which the key was taken, the jury were clearly instructed that that was a question of fact for them to determine, and that unless they found that it was taken with the intent to permanently appropriate it, or if they entertained any reasonable doubt as to that having been the intent, they must acquit. We do not think that it was error to go farther, or to follow the prisoner's counsel in the theories suggested by him as to what different intent might have been in the minds of the takers. Nor was there error in refusing to give specific instructions to the jury as to the method they should pursue in weighing the evidence of the witnesses. The court, in answer to some of the requests, charged the jury that they should take into consideration all the facts of the case, and if they had any reasonable doubt of the prisoner's guilt, they should acquit, and that the weight to be given to all the evidence was within their province, and not his. He had charged them specifically as to the facts which they must find to authorize them to convict, and we think his charge in this respect was quite favorable to the prisoner. The request of the court to the jury to endeavor to reconcile their differences, if any should exist, so that a conclusion might be reached, and that the trial might be a final disposition of the case, did not constitute error.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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In the Matter of the Petition of RALPH MARSH to Vacate an Assessment.

The published notice inviting bids for a local improvement in the city of New York contained a provision that the bidders should state in their proposals the price per cubic yard for rock excavations, and one-fourth the price bid would be allowed as the price for earth excavations; the notice contained the estimated quantities of work to be done. *Held*, that in the absence of allegations or proof that the provision was fraudulently inserted or that it in fact did any harm, this was not a violation of the provisions of the charter of 1870 (§ 104, chap. 137, Laws of 1870), requiring contracts for such work to be let to the lowest bidder.

A bid a little lower than the one accepted, tested by the estimated quantities, was rejected because of failure to conform to this specification, the bid for earth excavation being slightly in excess of one-fourth of that paid for rock excavation. *Held*, that the commissioner of public works having authority to insert the specification could require a literal and exact compliance therewith, and could reject as informal all bids not so complying, and a letting to the lowest bidder who did so comply, was valid.

It appeared that the bid accepted, tested by the actual quantities as found in the prosecution of the work and as paid for, was the lowest. *Held*, that the error, if any, in not awarding the contract to the apparent lowest bidder was not a substantial one within the meaning of the statute of 1874, relating to the vacating of assessments (chaps. 312, 313, Laws of 1874); and that one whose lands were assessed for the improvement was not aggrieved thereby; and, therefore, was not entitled to have the assessment vacated.

(Argued December 14, 1880; decided January 18, 1881.)

APPEAL from order of the General Term of the Supreme Court of the first judicial department, made July 1, 1880, reversing an order of Special Term, vacating an assessment upon lands of the petitioner for regulating, grading, etc., Ninety-sixth street in the city of New York. (Mem. of decision below, 21 Hun, 582.)

The facts appear sufficiently in the opinion.

John C. Shaw for appellant. The work for which this assessment was laid could only be done by contract given to the lowest bidder, and founded on sealed bids and proposals and pub-

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lic competition. (Laws of 1870, chap. 137, art. 15, § 104; Laws of 1861, chap. 308; *People ex rel. Campbell* v. *Green*, MSS.) That which is directory in the statute as regards the liability of the city to a contractor may be held mandatory as regards the liability of the citizen for assessments. (*Moore* v. *The Mayor*, 73 N. Y. 238, 249–251; *People ex rel. Williams* v. *Haines*, 49 id. 587, 594; *In re Em. Ind. Svgs. Bk.*, 75 id. 388; *In re Mahan*, Ct. App., decided April 13, 1880; *In re Manhattan Ind. Sav. Ins.*, Ct. App., decided September 21, 1880.) A non-compliance with the laws and ordinances requiring the public letting of a contract to the lowest bidder is a grievance and a substantial error, and not one of the errors specified in chapter 313 of the Laws of 1874, as those for which assessments should not be vacated. (*In re Em. Ind. Sav. Bk.*, 75 N. Y. 388, 395; *In re Prot. Ep. School*, id. 324; *In re Walter*, id. 354; *In re Mahan*, Ct. Appeals, decided April 13, 1880; *In re Manhattan Ind. Sav Ins.*, Ct. Appeals, decided September 21, 1880.) The certificate of the commissioners under the act of 1872 did not affect the rights of parties to vacate assessments under the exceptions contained in section 7 of that act. (*In re Burmeister*, 76 N. Y. 179; *In re Astor*, 53 id. 617; *In re Mahan*, Ct. Appeals, decided April 13, 1880; *In re Em. Ind. Svgs. Bk.*, 75 N. Y. 388, 395; *In re Prot. Ep. School*, id. 324; *In re Walter*, id. 354.) The certificate of the commissioners was void. (*Merritt* v. *Village of Port Chester*, 71 N. Y. 309; *Nat. Bk. of Chemung* v. *City of Elmira*, 53 id. 49, 59; *Bellinger* v. *Gray*, 51 id. 610, 620; *Westfall* v. *Preston*, 49 id. 349, 354, 355; *Van Rensselaer* v. *Whitbeck*, 7 id. 517; *People* v. *McKinney*, 52 id. 374.)

Wm. C. Whitney for respondent. No statute required in express terms any thing more than that the contract should be given to the lowest bidder. (Laws of 1861, chap. 308, p. 702; Laws of 1870, chap. 137, p. 391.) This being a case neither of fraud nor repavement, the alleged irregularity in the letting of the contract is of no importance, in view of the certificate of the commissioners under chapter 580 of the Laws of 1872.

(*In the Matter of Dugro*, 50 N. Y. 513; *In the Matter of Robbins*, 82 id. 131; *Brown* v. *The Mayor*, 63 id. 239, 244.) The oath of office taken by the commissioners was a substantial and sufficient compliance with the provisions of chapter 580, Laws of 1872, and their decision as such commissioners cannot be impeached because said oath did not contain the very words of the statute. (Dillon on Corporations, § 153; id. 154; *Stockle* v. *Silsbee*, 41 Mich. 615; *In re M. & H. R. R. Co.*, 19 Wend. 135; 2 R. S. 605, § 7 [2d ed.]; *Varish* v. *Golden*, 35 N. Y. 462; *Buffalo & State Line R. Co.* v. *Supervisors Erie Co.*, 48 id. 93; *Brevoort* v. *City of Brooklyn*, 18 Hun, 383 [1879]; *People* v. *Crook*, 8 N. Y. 67; affirming 14 Barb. 259; *Olney* v. *Pierce*, 1 R. I. 292; *Blodgett* v. *Holbrook*, 39 Vt. 336; *Supervisors County of Allegany* v. *Van Campen*, 3 Wend. 49.) Action on a county treasurer's bond. (*Coleman* v. *Shattuck*, 62 N. Y. 353; *Bowman* v. *Cockrill*, 6 Kans. 311, 324; *People* v. *Supervisors of Ulster*, 34 N. Y. 268, 272.)

EARL, J. The petitioner asks to have the assessment in this case vacated on two grounds: (1) Because the notice inviting bids for the work upon the street contained the following provision: "Bidders will state in their proposals the price for excavating rock per cubic yard (one-fourth the price bid for rock excavation will be allowed as the price paid for earth excavation per cubic yard);" and (2) because the contract for the work was not let to the lowest bidder.

In 1867, the common council of the city of New York passed an ordinance that Ninety-sixth street, from Fifth avenue to the East river, be regulated, graded, etc., under the direction of the commissioner of public works. In pursuance of this ordinance, the commissioner, in September, 1870, advertised for proposals to do the work, and in the notice to contractors, the estimated quantities of work to be done were stated as follows: 6,000 cubic yards of earth excavation, 40,000 cubic yards of rock excavation, etc.; and the notice contained the provision above stated. There were a number of bidders for the work, among whom were Michael J. Bannon and Patrick Farley.

Bannon bid for rock excavation $1.30 per cubic yard, and for excavating earth five cents per cubic yard, and prices for other items of the work. Farley bid for the rock excavation $1.77 1-2 per cubic yard, and 44 3-4 cents per cubic yard for earth excavation, and also prices for other items of work. All the other bids were higher than those of Bannon and Farley, and the contract for the work was awarded to Bannon.

The law (§ 104, art. 15, chap. 137 of the Laws of 1870) required that the contract for this work should be let to the lowest bidder "under such regulations concerning it as shall be established by ordinance of the common council;" and the ordinances of the common council, as proved, provided that no contract should be made until proposals therefor had been advertised and estimates received and decided upon; that the several departments empowered to make contracts on the part of the corporation should issue the proposals for estimates and advertise the same; that the proposals should be in such form as might be prescribed by the department making the same and among other things should state the quantity and quality of supplies or the nature and extent, as near as possible, of the work required. There was nothing in the law or the ordinances which condemned the specification complained of and it is not the just subject of complaint unless it, in some way, prevented or had a tendency to prevent fair and real competition among bidders. The object of the statute and the ordinances was to invite real competition for work and to secure its performance for the lowest price which fair and real competition would produce.

Here no fixed price for any kind of work was named and no part of the work was withdrawn from competition by the commissioner and in these respects this case is unlike the case of *Mahan* and of the *Manhattan Savings Institution* recently decided by this court; but the price for all the work was left to be fixed by competition; and here too, unlike the cases just referred to, the quantities of work of each kind to be done were specified. While I can perceive no purpose to be served by this specification, it in no way interfered with fair competition

and the whole work was just as effectually subject to bids as if this specification had been absent. A bidder would take the specification and look at the quantities and the nature of the work and determine what he could do the excavation for, and then he could set such a price for the rock excavation as would enable him to do the earth excavation for one-fourth of that sum. The work was let as a whole and any bidder could in the first place estimate the cost of the whole and then distribute the sum among the items as he liked. This matter of form was by the terms of one of the ordinances committed to the department advertising for bids.

There is no allegation or proof that this specification was inserted for any fraudulent purpose or that it, in fact, did any harm in this case.

We are, therefore, of opinion that the first ground of alleged error is not well taken.

The contract was not let to the lowest bidder as Farley's bid was a little lower in the gross amount than Bannon's. But Farley did not conform to the specifications as interpreted by the commissioner and hence his bid was thrown out as informal. The price he bid on earth excavation was three-eighths of a cent per yard more than one-fourth of the sum he bid for rock excavation. This, it is true, was a trifling difference. But, if the commissioner had the right to insert the specification, as we hold he did have, then he had the right to require literal and exact compliance therewith, and to decline all bids as informal which did not comply therewith. The commissioner interpreted the specification to require the bids for earth excavation per yard to be not more than one-quarter the sum bid for rock excavation, thus allowing the bid for earth excavation to be less than the one-quarter. If this be the correct interpretation as it has been assumed to be by both parties to this proceeding, then Bannon was the lowest bidder who complied with the specification.

But if it was the intention of the commissioner by this specification to secure the proportion of one to four between the bids for earth excavation and rock excavation then I am

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unable to perceive why a bid for earth excavation of less than one-fourth was not just as informal as one for more than the one-fourth, and in this view Bannon's bid was just as informal as Farley's, and could for the same reason have been rejected.

But however the specification may be interpreted, there is a complete answer to the claim now made. While tested by the estimated quantities contained in the specification, Farley's bid for the whole work was the lowest; when tested by the actual quantities as found in the prosecution of the work and which had to be paid for under the contract, his bid was about $2,500 more than Bannon's, so that Bannon's bid, after fair competition with others, was actually the lowest and the petitioner and other owners of property liable to be assessed for the expense were actually benefited by the rejection of Farley's bid. The error, therefore, in not awarding the contract to Farley instead of Bannon was not a substantial one under chapters 312 and 313 of the Laws of 1874, and this petitioner was not aggrieved thereby.

These views make it unnecessary to consider any other matters brought to our attention upon the argument.

The order should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE EX REL. BENJAMIN K. PHELPS, Defendant in Error, *v.* THE COURT OF OYER AND TERMINER OF THE COUNTY OF NEW YORK, Plaintiff in Error.

In an indictment under the statute for obtaining a signature to a written instrument under false pretenses, it is not essential to set forth all the details of the fraud, it is sufficient to specify particularly the pretenses, to aver their falsity and the fraudulent intent, and to show how they were effectual in accomplishing the fraud.

If the false pretense averred and proved is capable of defrauding it is sufficient, and this must be determined by the circumstances of each particular case.

Such an indictment may be based upon a false claim of indebtedness

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against a municipal corporation; and if it appear that the claim was presented under circumstances and in such manner as was calculated to deceive the municipal officer whose duty it was to act thereon, and that his signature was thus procured, a conviction will be sustained.

The question in such case whether the false pretense was calculated to deceive and was capable of defrauding is one for the jury.

In an indictment, therefore, charging the accused with obtaining the signature of the mayor of the city of New York to a warrant drawn on its chamberlain by false pretenses, to wit: by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account, and that the city was justly indebted to the person in whose name the account was presented against the city. *Held*, that it was not necessary to set forth how the fraudulent account operated to deceive through the action of the intermediate agents of the corporation; that the manner in which the false representation reached the mayor was matter of detail belonging properly to the evidence on trial.

Upon the trial the mayor testified that he had no distinct recollection of what occurred at the time he signed the warrant, and knew that he signed it simply because his name was affixed to it, it appeared that the bill in question was delivered to him; he was then allowed to testify to the routine of business in his office. *Held*, no error.

It appeared from this evidence that while the mayor did not read or examine each voucher which accompanied the warrants presented to him to sign, he required their presence and was induced to sign by the presence of the bill and by the approval thereof by the proper officers. *Held*, that this authorized the submission of the question to the jury as to whether the presence of the bill was one of the inducements to the signature; that its bare presence although neither examined nor read by the mayor was a false pretense.

It is not necessary to sustain a conviction in such case, that the false pretense was the sole inducement to the act of the party defrauded.

Nor is it material that the bill went through the hands of other and independent officers before reaching the mayor, who might have stopped its progress; and this whether they were misled by the fraud of the accused or obeyed his orders.

It is not necessary that words should be spoken or written to create a false representation; a mute or silent act may convey the falsehood, and if it does, it constitutes the offense.

It appeared that a duplicate of the bill was, in accordance with the custom in the municipal offices, prepared and accompanied the original bill when presented to the mayor. *Held*, that this fact and that the duplicate might alone have produced the result, was immaterial, as it was but part and parcel of the false pretense for which the prisoner was responsible.

A juror was challenged by the prisoner for principal cause and to the favor; he testified in substance that he had read in the newspapers of great frauds

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perpetrated against the city; that he had read of the prisoner's case and had formed in some degree an opinion in regard thereto, which he had yet, and it would require evidence to remove it; but that his opinion was contingent, founded on an assumption of the truth of what he had read, which he had not investigated; that his opinion was the general impression a man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict and that his previously formed opinion would not bias or affect such verdict, nor would he be influenced at all on the trial thereby; that if put upon the jury he would discard his opinion and decide upon the testimony, and in that event it would not require evidence to overcome his opinion, and he would try the case without being influenced by it. The challenges were overruled and the juror was then challenged peremptorily. After the full number of peremptory challenges had been exhausted another juror was called, whom the prisoner's counsel proposed to challenge peremptorily upon the ground that they had been unlawfully compelled to exhaust challenges by the alleged erroneous decision of the court as to the competency of said juror. The court denied the right to further peremptory challenges. *Held*, no error; that if the question could be thus raised, as to which *quære*, the ruling as to competency was correct and the exhaustion of the peremptory challenges was not compelled by any error of the court.

Greenfield v. *The People* (74 N. Y. 277), distinguished.

A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own.

The range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character.

Where this limitation has been regarded, this court cannot interfere, save where there has been an abuse of discretion.

(Argued December 15, 1880; decided January 18, 1881.)

ERROR to the General Term of the Supreme Court in the first judicial department, to review an order made March 1, 1880, affirming a conviction of Henry W. Genet, in the court of Oyer and Terminer in and for the county of New York, of the crime of obtaining a signature to a written instrument by means of false pretenses.

The court of Oyer and Terminer suspended sentence upon the conviction, and the case was brought before the General

Statement of case.

Term of the Supreme Court by certiorari issued in pursuance of the statute, on petition of the district attorney.

The substance of the indictment and the material facts appear in the opinion.

Nelson J. Waterbury for plaintiff in error. The court erred in refusing to allow the peremptory challenge and challenges to favor to the jurors Ross, Blagden and Evans. (*People* v. *Bodine*, 1 Den. 281, 305, 308; [1 Inst.] 157 b.; 1 Chit. Cr. Law, "544, 549 [4th Am. ed.]; 1 Trials per Pais. 195;" *Thomas* v. *The People*, 67 N. Y. 218, 222; *Greenfield* v. *People*, 74 id. 277, 283; *Freeman* v. *The People*, 4 Den. 9; *People* v. *Honeyman*, 3 id. 121; *People* v. *Thompson*, 41 N. Y. 1; *O'Brien* v. *The People*, 36 id. 276; *Cancemi* v. *The People*, 18 id. 128, 138; *Taylor v. Porter*, 4 Hill, 140; *Wynehamer* v. *The People*, 13 N. Y. 378; 4 Bl. Com. 353; 2 Dev. & Batt. 205; 4 Ohio, 350.) The attempt to prove by the cross-examination of the accused that he had been guilty of misconduct other than that alleged in the indictment was error. (*Stover* v. *The People*, 56 N. Y. 315, 320; *People* v. *Brown*, 72 id. 571, 574.)

W. A. Beach for plaintiff in error. The evidence does not present a case of false pretense within the statute. (*The People* v. *Gates*, 13 Wend. 311; Bouvier's Dict., title "False token"; *The King* v. *Lara*, 6 Term. 565; *The People* v. *Babcock*, 7 Johns. 201, 204; Archbold Cr. Pr. by Waterman, [7th ed.], 617, margin, 466, note; *Ranney* v. *The People*, 22 N. Y. 413, 416; *Rex* v. *Cadington*, 1 Car. & P. 661; *Rex* v. *Pyrvell*, 1 Stark. N. P. C. 402; *Regina* v. *Evans*, 9 Cox, C. C. 238; 2 Bishop on Criminal Law, 406; *Rex* v. *Leonard*, 2 Car. & P. 514; *Rex* v. *Mitchell*, 2 East's P. C. 830; *Rea* v. *Barnard*, 7 Car. & P. 784; *Rea* v. *Storey*, R. & Ry. 81; *Daniel K. Allen's Case*, 3 City H. R. 118; *James Conger's Case*, 4 id. 65, 69; *Commonwealth* v. *Drew*, 19 Pick. 179; *People* v. *Haynes*, 14 Wend. 558; 2 Wharton's Cr. Law, § 2107; 2 East, C. P. Cr. 18, § 2, p. 819; *Greenleaf* v. *Munford*,

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19 Abb. 469, 475–6; *Lynch's Case*, 1 City H. Rec. 138; *The People* v. *Williams*, 4 Hill, 9; *The People* v. *Adams*, 3 Den. 190 [S. C.], 1 Comst. 173; *Regina* v. *Gardner*, 7 Cox, C. C. 136; 2 Bish. on Cr. Pro., § 180; *People* v. *Gates*, 13 Wend. 311, 322; *People* v. *Chapman*, 4 Parker, 56; *United States* v. *Cruikshank*, 2 Otto, 558, 562; *Bradlaugh* v. *The Queen*, 5 Rep. 701.) To be indictable, the false pretense must have exerted a material, if not controlling effect in procuring the mayor's signature. (*People* v. *Crissie*, 4 Den. 525; *People* v. *Haynes*, 11 Wend. 557; *Clark* v. *The People*, 2 Law. 329; 2 Bishop on Criminal Law, § 438.) The court below erred in refusing to defendant the right to prove the "purpose" of Davidson in preparing the bill. (*Kerrains* v. *People*, 60 N. Y. 221; *Armstrong* v. *People*, 70 id. 33; *Tracy* v. *McManus*, 58 id. 257; *Ins. Co.* v. *Hachfield*, 73 id. 226; *Superintendent* v. *Herkimer*, 44 id. 22. It was error to deny the defendant the right to put leading questions on the cross-examination of Davidson. (*The Phila. & T. R. R. Co.* v. *Stimpson*, 14 Pet. 448, 461; *Houghton* v. *Jones*, 1 Wall. 702; 1 Greenleaf on Evidence, § 445; *Jackson* v. *Varick*, 7 Cow. 238; S. C., on Error, 2 Wend. 166; *Fulton Bank* v. *Stafford*, id. 483; 1 Greenleaf on Evidence, § 477; 2 Phillip's Evidence [text], 401; 2 Cow. & Hill's Notes, 723, note 373; 2 Best on Evidence [Am. ed.], by Wood, § 641; Starkie on Evidence [9th ed.], 174, margin, 196.)

Daniel G. Rollins for defendant in error. The subsequent peremptory challenge to jurors waived the other challenges. (*Freeman* v. *The People*, 4 Den. 9; *Feery* v. *The People*, 2 Keyes, 442; *People* v. *Bodine*, 1 Den. 283.) Exception will not lie to an erroneous exclusion of a question as leading, the ruling being simply as to the form of the question and not as to the substance of the testimony. (*Walker* v. *Dunspaugh*, 20 N. Y. 170.) The testimony of the mayor as to the way in which his signature was obtained, given not from independent recollection of this particular transaction, but from his ordinary course of business as a public officer, was admissible. (1

Greenleaf's Evidence, § 40; Stephen's Dig. of the Law of Evidence [Am. ed.], p. 63.) The court properly refused to charge that defendant was not responsible for the bill after he handed it to the court-house commissioners, and that he might still be responsible if he committed the offense through an innocent agent. (*People* v. *Adams*, 3 Den. 190; *Com.* v. *Harley*, 7 Metc. 462; *People* v. *Adams*, 1 N Y. 173; *Comm.* v. *Call*, 21 Pick. 523.) The question of the materiality and influence of the pretense is always one for the jury. (*Thomas* v. *The People*, 34 N. Y. 551.)

FINCH, J. The writ of error in this case brings up for review the proceedings upon the trial of Henry W. Genet, charged with obtaining by false pretenses the signature of the mayor of the city of New York to a warrant, drawn on the chamberlain, and subsequently paid to the accused. The false pretense alleged in the indictment, and sought to be proved on the trial, consisted of a fraudulent bill, made out in behalf of one Davidson, and sent on its way through the hands of the city officials until it received the final signature of the mayor, and became thereby the means of obtaining the money. It is necessary to examine somewhat minutely the facts established, since it is very earnestly and forcibly argued that they wholly failed to establish the guilt of the accused.

The first proposition claimed to have been proven on behalf of the prosecution was, that Genet originated and dictated the false and fraudulent bill. The evidence on that subject is wholly confined to the two parties to the transaction. William M. Tweed, John McQuade and Josiah Porter were commissioners for building what was known as the Harlem Court-house. Genet had been active and influential in procuring the necessary legislation to authorize its construction, and was the counsel of the commissioners. Davidson swears that, being in Albany and in Tweed's room, the latter suggested that iron work was wanted for the court-house. Davidson, being engaged in that business, seems to have been tempted by the opportunity, and sought Tweed's influence to procure a contract for him.

Tweed thereupon referred him to Genet, and afterward told the latter, as he testified, to see the contractor and architect, in relation to it, for Davidson must have the work. There was no formal contract made, no agreement as to quantity, price, or value, and no authority to make such contract, conferred upon Genet. What the latter did was something entirely different. On his statement of what was wanted Davidson prepared what he calls an "estimate," on the basis of which, avoiding all items and details, he made out a bill in the following form: "1871, January, February, March, April, May, June. To iron work, window frames, iron timbers, etc., etc., on contract as per agreement with commissioners, $4,710, cartage, $92," the whole footing up, $4,802. Davidson swears that the entire form of the bill was dictated by Genet, and that especially the months stated in it were expressly directed by him to be inserted. Genet, on the other hand, charges the preparation of the bill to Davidson, and says, by way of explanation, that the latter declined to furnish the iron work except on a stipulation that the money was to be paid on delivery, and this bill was prepared to enable Genet to procure the money and so be ready to meet the emergency. Davidson admits that he did make such a stipulation. But, granting the truth of that statement, what was it that these men were doing? They were planning a fraud upon the city. Confessedly they were constructing a false and fraudulent bill, the admitted purpose of which was to get from the city officials its amount upon the false pretense that a contract existed and had existed for six months with the commissioners for the supply of the material; that the same had been in fact supplied; that in the process of so doing the expense of cartage had been incurred; and that the stipulated price was due and payable. All this was what the bill imported; and was its plain meaning and distinct representation as broadly as we have stated it here. That representation was utterly and thoroughly false, and known by both parties to be false. Whatever may have been the ultimate purpose, one thing at least is certain. Both parties meant by simulating an honest bill to get from the city its amount upon the pretense

and representation that the materials had been actually furnished when they had not been furnished at all. About this original purpose there can be no possibility of mistake. The framing and preparation of this bill can have no other explanation, and no other is attempted. The jury were at liberty to believe Davidson's version of the transaction, and if they did, it established a fact which of necessity throws light upon what followed, and becomes an important element in the solution of the serious questions which remain. The jury were justified in believing that the intended fraud originated with Genet, and was his especial project. Nobody would meditate such a plan, or deem it for one moment practicable, except one thoroughly familiar with the business routine of the city, capable of influencing its officials, and especially, reasonably confident of his ability to procure the assent of the court-house commissioners and the contractor to a claim without foundation in fact. Davidson was not so situated. It is incredible that he should have deemed such a fraud so capable of success as to originate and propose it. Genet's position was different. With his relations to the commissioners and the contractor, which we shall soon see were peculiar, and gave him great control and abundance of opportunity, the project became, at least, possible and within the range of success. Of the two men, one of whom must have originated and planned the fraud, every probability and all the surroundings point to Genet. The proposition must, therefore, be taken as established that he originated and planned a fraudulent scheme by the false pretense of a seemingly honest bill to get from the city the amount of that bill through the necessary routine, when in truth no debt or liability existed.

The next step in the proof relates to the execution of the plan. The prosecution claim to have established that Genet took the fraudulent bill, which in the case is known as the "blue paper bill," to the commissioners of the court-house; procured their certificate of its correctness; obtained the written approval of Scallon, the contractor; delivered it to Carson, who was the secretary of the commissioners; and directed

that it be sent, with these marks of honesty upon it, to the comptroller for the purpose of being audited, and terminating its mission in a warrant which would produce the money. There is no direct evidence of all these facts. Genet admits that he took the bill to one of the commissioners or to Carson, but denies having given any directions. Circumstances, however, speak very strongly and sometimes lead to inevitable inferences. How came the commissioners to certify this bill? The court-house had hardly got beyond its foundations. This iron work was apparently not yet needed. The commissioners controlling this construction may fairly be supposed to have known that no such material as was charged for in the bill had been furnished. One thing at least they did know. The bill said, "as per contract with the commissioners." Assuredly they knew that statement to be false. They had made no such contract. Even Genet does not pretend they had. And did not Scallon know? He was the contractor, the builder of the structure. He certainly knew; it is impossible to believe that he did not know, that this bill was wholly false and a sheer fabrication. How came he to certify its correctness? He had no interest to put his name to such a fraudulent voucher, unless some one induced him to do it; and that person must have been one having great power and influence over him. That could have been no one but Genet. The evidence gives us plain traces of the extent and power of his influence over these persons. He was, if not the originator, at least the early and persistent advocate of the new building. He was the counsel of the commissioners. Almost $100,000 of the public money appropriated to the work in progress, by some means, in some way, went through his bank account. His relatives were drawing salaries in positions under the commissioners obtained through his influence. Scallon was in his employ and engaged in building for him a costly house, and probably owed him much of service and gratitude. These facts again point to Genet as the agent effecting the result. It took some influence and power to make these men lend themselves to such a fraud. Genet possessed it. He had the motive,

for this was but a necessary step in the execution of the original plan which, as we have shown, he prepared. The question was fairly submitted to the jury whether Genet delivered this bill to the commissioners for their approval and with directions that it be sent to the comptroller for audit. It did not go there of itself alone. The motive and the force behind it was Genet. So the jury found, and there was evidence and a rational basis for their conclusion. We must assume, therefore, as sufficiently proved and fairly found, that Genet, after procuring the certificates of the commissioners and the contractor, directed this false bill to be sent to the comptroller for the necessary audit.

The next proof on the part of the people relates to that audit. The proposition asserted is that Genet, having caused this bill to be sent to the comptroller, requested the auditor to certify to its correctness, the comptroller to draw a warrant for its amount, and the mayor to countersign that award; and that these officials did so, relying upon the false representations of the bill, and trusting to their truth. The case is plain enough so far as the action of the auditor and comptroller are concerned. Carson, in preparing this bill for their audit, made out a duplicate of it upon a blank furnished by the comptroller's office, the purpose of which blank was to secure as far as possible desired uniformity in the vouchers to be put on file. This duplicate, known as the "white paper bill," varied somewhat in form from the original bill, but in substance repeated its false representations and was practically a copy of it. There was no falsehood in the one that was not in the other. The formal voucher too on its face and in terms referred to the other by the words "as per annexed bill." Was the blue paper bill so annexed? Again there is an absence of direct evidence but a series of circumstances point to the truth. What would Carson, who made this duplicate, be certain to do? He either believed the bill to be honest or dishonest. If he thought it honest, when he prepared the new voucher referring to the other as "annexed," he would naturally annex it. That would be regular and proper and saying that it was annexed we must presume that he did it. If he knew or suspected it was dis-

honest, which is most likely, he would be even more sure to annex it. Its absence would be certain to attract the very notice and criticism necessary to be avoided. But the proof goes further. None of the officials in the comptroller's office recollect these bills or the circumstances attending their audit. Some of them do indeed say that both papers were before them, but a cross-examination develops that the statement depends, not upon memory, but upon reasoning, and inferences drawn from the routine and habit of the office. The deputy comptroller tells us that, as a general thing, the original bills were fastened to the duplicates furnished by the office; that they endeavored to carry out that arrangement but it was not always done, and that in a case like the present, where the "white paper bill" referred to the original as annexed, he should question it as a complete voucher if the original bill was absent. The warrant clerk swears that he filled in the warrant from the two papers, and that both were before him when he did so, but he afterward explains that this is matter of judgment with him from the two facts that the amount of the bills and of the warrant, as also the numbers of both, correspond. The auditor testified that he had no specific recollection of the presence of the original bill, but when asked what would have been his action when he saw the duplicate was made out "as per annexed bill," he answers that he would have had to get the bill referred to as annexed, and would not have signed his name without it. Another circumstance appears and adds its weight. The mayor, at the trial, pointed out upon the original bill of Davidson, "the blue paper bill," the initials of W. H. Wiggins, the book-keeper of the comptroller; a fact which indicates very clearly that such original bill was present in the comptroller's office, and leaves it reasonably certain that it was annexed to the white paper duplicate. In that condition the complete voucher received the stamp and signature of the auditor, the comptroller drew and signed the corresponding warrant, and voucher and warrant went to the mayor for his final signature. As it has been satisfactorily shown that both the original bill and its white paper duplicate were before the auditor, and the

further fact is distinctly proved that thereafter no change was ever made in a voucher, it follows that the two bills were both before the mayor when his final action was taken. All the facts and every circumstance point to that as the truth, and the jury were entirely justified in concluding that both bills, constituting a complete voucher, were before the mayor when he countersigned the comptroller's warrant. The mayor's mental processes at the moment of that signature were the subject of examination and cross-examination. His own statement of them is calculated to aid the inferences to be drawn, but is not necessarily conclusive. Both court and jury may consider the facts and draw from them the just and legitimate conclusion.

It is quite evident that the mayor had no independent recollection of the particular transaction. He knew he signed the warrant, for the papers were shown him, and he recognized his signature. What else he says is drawn from the routine of his office, and his memory of the modes and reasons of his action. The routine, he describes thus: "a warrant would reach me, not in the shape you first hand it to me, but with a paper or papers pinned, or in some way annexed to it; they would be papers which I believed to be vouchers representing specifications of the general description written on the face of this warrant. * * * There was always what I believed to be a voucher, and assumed to be a voucher, because of a stamp on the back. * * * I would not have signed the warrant, unless I believed the paper annexed to it was a voucher specifying the entry in the minute. * * * My reliance was upon the signature of the comptroller and of the auditor, and as I have stated before, without any examination. * * * I recollect from the general course of business I never signed a warrant detached except for salaries. * * * I certainly would never have signed any warrant if I had not believed on the faith of the comptroller's approval, and auditor's examination that the description of the claim or debt was honest, and the papers, if any, on which it was founded, examined by them were honest. * * * The signatures of the auditor and

comptroller indicated that it was an honest and true bill and I believed on their belief." This is the substance of the mayor's evidence. Through all the variations of question and answer it came down to two things; that he would not have signed without the presence of the voucher; and for its accuracy and honesty he relied entirely on the examination and certificate of the auditor and comptroller. This evidence raises the grave and serious question in the case. Before considering it one other fact needs to be stated, for the light it throws backward on the transaction. After the mayor had countersigned the warrant, it was returned to the comptroller's office, and Genet, as he says happening to hear it was there, asked for and received it, acting as the authorized agent of Davidson, and soon after indorsed it in the latter's name, and drew the money. We find the accused at the beginning and the end of the transaction. He who planned the artifice is found at the end of the chain of events possessing himself of the fruits of the fraud. What he originally intended was in fact accomplished.

We have thus sought to recall the proofs in order to test more intelligently the objections raised to their sufficiency which are many and serious.

At the outset, the indictment is assailed. It is claimed that the false pretense is insufficiently pleaded, and that the details of the fraud, showing how it operated to deceive through the action of the intermediate agents, should have been stated. Undoubtedly it is the rule that the indictment must specify at length the particulars of the fraudulent representation and show how it was effectual in accomplishing the fraud; it must be explicit enough to support itself, and must relate an intelligible story. (*The People* v. *Gates*, 13 Wend. 311.) But the pleading before us does not violate that rule. It alleges the false pretense particularly and explicitly. It states that the defendant pretended and represented to the mayor that the city was justly indebted to Davidson in the sum of $4,802, for materials furnished for the ninth district court-house by said Davidson, and that his bill for the same, a copy of which is recited, was a true statement of the account; and that

Davidson had supplied the iron work and materials and the cartage, and the city had received the same for its proper uses. The indictment then avers specifically and separately the falsity of each of said representations, and the fraudulent intent with which they were made, and that thereby the mayor was induced to sign and deliver to Genet, the warrant drawn on the chamberlain. The allegations show sufficiently the character and circumstances of the false pretenses and how they were effectual to accomplish the fraud. It was said in *Thomas* v. *The People* (34 N. Y. 352), that it is sufficient to state and to negate one false pretense in an indictment, and if the pretense is "capable of defrauding," that is sufficient. The allegation that the accused pretended and represented to the mayor is sufficient without averring the channels or route by which the representations reached him. That is matter of detail and belongs properly to the evidence. (*Skiff* v. *The People*, 2 Park. Cr. Rep. 139.) We think the indictment sufficiently stated the material circumstances of the accusation.

The argument in behalf of the accused then alleges the insufficiency of the facts proven upon the trial. We are reminded that a mere private cheat is not within the statute, and that the false pretenses must be such as are calculated to mislead ordinary prudence and caution. The rule has been stated in that form. (*People* v. *Williams*, 4 Hill, 9.) But since the law was intended to protect the weak and credulous as well as the careful and intelligent, and since the materiality and influence of the pretense is for the jury to determine from the evidence (*Thomas* v. *The People*, *supra*), it is perhaps quite as accurate to say merely that the pretenses must be calculated to deceive, leaving that to be determined from the circumstances of each particular case. If the pretense is capable of defrauding that is sufficient. (*Reg.* v. *Woolley*, 4 Cox's C. C. 193.)

It was argued, however, that the pretenses proved against the accused were not of that character for the reason that they consisted of a false claim of indebtedness due from the alleged debtor, and it is said that one who makes such claim to a debtor who must be assumed to know that he does not owe

the debt, cannot be said to have induced the payment by his unfounded demand. That may be true of the case supposed and yet not be true of the one before us. The alleged debtor in this case is a municipal corporation. It can act only by and through its appointed officers and agents. It cannot be assumed that they would necessarily know in every instance that a debt claimed to be due from the city was without foundation. Indeed the very guards and precautions thrown around the allowance and audit of bills against the city, shown by the evidence in the case before us, indicate a consciousness of the danger of deceit and fraud. But in any event the question whether the false pretenses of Genet were calculated to deceive, and were capable of defrauding was a question for the jury. They have found it against the accused, having before them all the circumstances proved upon the trial and we can see no just reason for reversing that decision. As matter of fact it *did* deceive; it *did* induce the audit and approval of the comptroller's office; and in the face of that fact it is impossible to say that the false bill was not calculated to deceive or incapable of defrauding.

But we reach now a more difficult question. The charge in the indictment is for procuring the signature of the mayor to the warrant. Unless that fact is proved, no crime is established. The jury by their verdict have found that the mayor's signature was induced by the fraudulent representations of Genet, and the precise question raised is whether there was any evidence to sustain that finding.

That there was none is maintained by the learned counsel for the appellant mainly upon three grounds: *first*, that the original or "blue paper" bill was not proved to have been delivered to the Mayor; *second*, that his entire statement was founded solely upon the routine of his office, and the evidence of such routine was incompetent; and *thirdly*, that the proof shows conclusively that the mayor relied wholly, as the inducement to sign the warrant, upon the audit and signatures of the auditor and comptroller, and not at all upon the false voucher which he did not even examine.

The first objection has already been determined against the appellant by our conclusion upon the facts that the evidence warranted a determination that the "blue paper" bill was before the mayor and formed part of the complete voucher delivered to him with the warrant. The second objection has been ruled adversely by the authorities. In *The People* v. *Gates* (13 Wend. 311, *supra*) the precise question was raised. There, as here, the witness had no distinct recollection of what transpired when he signed the paper and knew that he signed it only because his name was affixed to it. There, as here, his further evidence was based wholly upon his official routine, to which objection was made. The court held the evidence competent, saying: "The tendency of the testimony was to prove the defendant's guilt. If the witness never signed any such bond but what was presented to him by the defendant, and the defendant in all cases made the representations alleged, and the witness did sign the bond in question, and it was presented by the defendant, this is nearly or quite tantamount to saying that the defendant on the present occasion made those representations." The evidence of the mayor, therefore, as to the routine of his office, was competent, and brings us fairly to a consideration of its effect, which is the third and serious ground of objection remaining to be considered. The argument in its support is a critical and close analysis which separates the transaction into its component parts and presents for our study, one at a time, the separate links of the disconnected chain. Waiving for the present the effect of uniting the severed links, let us follow the argument as presented.

The mayor did not read or examine the voucher which accompanied the warrant. It is certain therefore, that he was not moved by a knowledge of its contents. What did move him, it is said, was solely and alone the signature of the auditor and comptroller, and these were not Genet's act but the independent audit of independent officers, performing a duty imposed upon them by the law. And it is further suggested that the reliance of the mayor upon the audit would have led to his signature if the "white paper bill" alone had been present,

and that was the act of Carson and not of Genet. It is undoubtedly true that but two things operated to induce the action of the mayor, and these were first, the presence of a bill against the city which could be the subject of approval and payment; and, second, the actual approval indorsed and attending it of the proper officers. These two influences acted concurrently to produce the result. The presence of the bill or claim alone would not have been sufficient, nor without that would the signature of the comptroller or of the auditor, for the mayor expressly says that he never signed a detached warrant or one unaccompanied by a bill which he assumed to be the subject of payment, except in the case of warrant for the payment of salaries. Each of the concurring causes was material to the result, and it is therefore idle to speculate upon the relative importance of either. Each was a necessary and operative inducement to the resultant signature, and if either was the act of Genet, if either came to the mayor, impelled and moved by the accused, the false pretense is his, and produced the final result. For it is not necessary to sustain a conviction that such pretense should be the sole inducement to the act of the party defrauded. (*People* v. *Haynes*, 11 Wend. 557.) If that were so it would be impossible to convict, for in nearly every case some elements of truth are mixed with the falsehood, and make the latter more dangerous. If the false pretenses had a material effect in producing the result that is sufficient, even though such pretenses were intermingled with other and truthful elements. If, therefore, in this case, the bare presence of the false voucher was a material inducement to the signature of the mayor, which is sufficiently proved, it leaves open only the inquiry whether it was there by the act and agency of Genet, and was a false pretense within the statute. We have already said that the evidence sufficiently shows that the original bill framed and dictated by Genet, was before the mayor as part of the complete voucher, and came there by his impelling act and direction. That it went through other hands can make no difference, nor that the intermediate agencies were inde-

pendent officers who might have stopped its progress. (*People* v. *Adams*, 3 Den. 190; 1 N. Y. 173; *Com.* v. *Harley*, 7 Metc. 462; *Com.* v. *Call*, 21 Pick. 523; *Rex* v. *Brisac*, 4 East, 164.) These were all cases in which the false representation or writing reached the victim through the intervention of innocent third persons. However indirect or circuitous the channel by which it reaches its destination, when there, the person who gave it its direction and aim is also there by the instrument used to effect his purpose. Its bare presence, although neither examined nor read by the mayor, was a false pretense. It did deceive him; it did procure his signature; it said to him by its mere presence that it was an honest claim awaiting payment, when, in truth, it was a bold fraud, simulating honesty to procure a warrant for a sum, no part of which was due. It is not always necessary that words should be spoken or written to create a false representation. A mute or silent act may effectively convey the falsehood, and if it does the consequence and the crime are the same. The defendant in *Rex* v. *Barnard* (7 Car. & P. 784) who assumed the garb and peculiar dress of a commoner at Oxford, and thereby procured credit, if he had uttered no word of falsehood, it was held would have conveyed the lie as effectually, and wronged his victim as thoroughly, as when saying he was a student of the university, and both honorable and responsible. Nor does it change the situation that the duplicate or "white paper bill" was also there, and might alone have produced the result. It was the same, identical, false representation on another paper and in another shape, but equally false and aimed at the same result. If, indeed, that had been a separate representation, framed by somebody else, and for which Genet was in no manner responsible, a different question might arise. But it came to the mayor attached to the original bill, and in terms referring to it, and simply copying its falsehoods. It thus became part and parcel of the false pretense for which Genet was responsible — his repetition of the falsehood annexed to the original. Analysis may separate them, but, in fact, they con-

stituted but one false representation, having but one origin and accomplishing but one purpose.

But it seems to us there is another light in which the questions raised may be viewed, and leading, perhaps, to clearer results. The complete transaction taken together, studied as a whole, may materially assist the effort to reach a just and satisfactory conclusion. It may not be doubted that if Genet framed this bill for the purpose, and with the intent, of fraudulently passing it through the known and understood routine to payment; and in the execution of that purpose procured through his personal influence the certificates of the commissioners and the contractor; then gave it to Carson with directions to make out a duplicate and attach the original and send it to the comptroller; thereupon requested the auditor to stamp it as correct and the comptroller to draw his warrant, assuring both that the bill was correct and true; and next requested them to send warrant and bill thus certified to the mayor for his signature; and finally followed them to the latter's office and telling him that the bill was honest and had been certified accordingly, requested the mayor to countersign the warrant, which that official did; if, we repeat, all these things had occurred consecutively, in their order, it may not be denied that a clear case would have been established against the accused of obtaining the final signature of the mayor to the warrant by false pretenses. Exactly this was what occurred except in the one fact, which may, indeed, be gravely important, and challenges our attention, that Genet did not personally and in words request the auditor and comptroller to audit and then send the bill to the mayor; and did not personally and in words request the latter to sign; and did not personally and in words assure each that the bill was correct and honest. If that difference is rather formal and on the surface than real and substantial, the main question on this appeal is answered. It has already been shown that the evidence justified the conclusion that Genet directed Carson to send the bill and duplicate to the comptroller for the purpose of audit and payment, and that this was done in the execution of an original plan to secure that payment by this process. What

that process was, the character of the routine, it is reasonable from Genet's own testimony to believe he perfectly understood. He was a frequent, almost daily visitor, at the comptroller's office; had collected for other persons warrants in the usual form for very large amounts, and collected in that way a great many bills; had been a member of the common council and was the attorney of the court-house commissioners. When, therefore, he dictated this bill, when he got it certified by commissioners and contractors, and directed it to be sent to the comptroller, he knew all that was involved in that direction, and the natural and necessary consequences of his act. For such consequences every man is responsible. Nothing is better settled than that. Genet knew that if he sent that bill to the comptroller's office the act would be understood to mean the assertion of an honest claim against the city, and a request that it be audited, and a warrant drawn for its amount. When he sent it there it follows that by the act he did assert the honesty of the claim, and did request the audit and the warrant. He could not have understood, or intended any thing else. He knew further that after such audit and the signing of the warrant, both would be sent to the mayor, and that, by that act the mayor would be assured that the claim was just, and that, therefore, his signature was requested to the warrant. This consequence of Genet's act he both clearly foresaw and actually intended. It resulted from his original act, and he meant that it should so result. The comptroller and auditor, public officers though they were, became through his act and deception, the innocent agents of his fraud upon the mayor. What they did was at his request and by his direction as much as if he had been personally present, for the act was within his original purpose and contemplation, and occasioned, and in legal effect, directed, by him. When they said — misled by his fraud, or obeying his orders — it matters not which, that the account was honest, it was Genet who said it through them; and when they asked for that reason for the mayor's signature, it was Genet who stood there asking, and who procured it to be made. The man who turns an engine valve upon a steamer, through the inter-

mediate agency of cylinder, piston, and walking beam, and shaft and paddle wheel, gives motion to the boat. It is no answer to say here that the intermediate agencies were not mere machines, obeying irresistible force, but independent and self-acting agents, not chained to Genet's will, and obeying necessarily his impulse; because, by his deception, he controlled and mastered that independence, and made it do his bidding. From first to last, therefore, every step taken was the product of his will and guided by his purpose; and when at the end he received the comptroller's warrant he had simply accomplished a purpose intended at the outset, through agencies operating under the influence of his fraud and, therefore, in obedience to his will. He, himself, by the false pretense of the Davidson bill, made all the more seemingly honest by certificates and audits procured by him, obtained the signature of the mayor. This is the plain truth of the transaction; the obvious inference to be drawn from it, and the verdict of the jury, sustained by it, is conclusive upon us, and cannot be reversed. The case was fairly submitted on this theory. Its separate elements were one by one and in careful detail commended to their attention. While in some respects direct proof was wanting the circumstantial evidence was strong and convincing. The verdict, therefore, must stand upon the facts, taken as a whole, and in their completeness, and is conclusive upon this appeal.

The same thing is to be said as to the further question of Genet's fraudulent intent. The evidence plainly warranted a finding of that fact, apart from his explanation and denial. The jury listened to that, and with all the facts before them disbelieved it. They had the right to do so; the duty and the responsibility were peculiarly theirs; and we can see no ground upon which we are at liberty to review their conclusion.

The further questions in the case grow out of the conduct of the trial.

Three jurors were challenged by the defense for principal cause, and to the favor, and were decided to be competent, and an exception to such decision was in each instance taken.

Each of these jurors, after such ruling, and exception, was challenged peremptorily by the defense. After the full number of their peremptory challenges was exhausted, another juror was called and examined, whom the defense proposed to challenge peremptorily, claiming the right to do so, notwithstanding their full number was exhausted, upon the ground that they had been unjustly and unlawfully driven to exhaust such challenges by the erroneous decision of the court in favor of the competency of the three jurors previously challenged for cause. The court ruled adversely, and denied to the defense any further right of peremptory challenge. The question raised is an important one, but is not before us, if the ruling as to the three jurors was correct. In that event the use of their peremptory challenges by the defense was of their own free choice, and in no manner compelled by any error of the court. It is not needed that we separate the cases of the three jurors, for they were in all material respects alike, except that in the case of Toplitz, the last of the three, the grounds of objection were most sharply defined, and rested upon the strongest foundation. All three of the jurors had read in the public newspapers accounts of great frauds perpetrated against the city, and had been more or less affected by what they had read. The juror Toplitz, on his examination by the counsel of the accused, said, that he had read of the Genet case in the newspapers; had formed in some degree an opinion in regard to it; had that opinion yet; and it would require evidence to remove it. In answer to inquiries on behalf of the prosecution he explained; that his opinion was contingent and hypothetical and founded on an assumption of the truth of what he had read, which he had not investigated; that such opinion was the general impression which any man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict and that his previously formed impression or opinion would not bias or affect his verdict; that he thought he would not be influenced at all on the trial by his opinion formed in advance; that, if he should leave that moment he would still hold his opinion, but if put upon the jury

would discard his opinion and decide upon the testimony; that in the latter event his mind would not be in such a condition that it would require evidence to overcome his opinion; and he could try the case without being influenced by that opinion.

We think this juror, and for the same reason, the other two who were challenged, were competent within the principles we have declared as applicable since the legislation of 1872 and 1873. (*Thomas* v. *The People*, 67 N. Y. 218; *Cox* v. *The People*, 80 id. 500; *Balbo* v. *The People*, id. 484.)

In the first of these cases it was held that impressions or opinions derived from hearing the matter talked about, and which depended upon the truth of what the juror had heard, did not disqualify, where he testified that he would decide the case upon the evidence, unbiased and uninfluenced by his impressions. And in the second case it was said, that where a juror testified that he had formed an opinion from reading the newspapers; that he believed what he there read till it was contradicted; that his opinion was contingent upon the supposed truth of the statements read; but could set aside his opinion and decide upon the evidence; he was competent to sit and the challenge was properly overruled. The decision in the case of *Greenfield* v. *The People*, (74 N. Y. 277) rested upon an entirely different state of facts. There the juror had read the testimony given on a previous trial of the prisoner for the same offense, and on that testimony had formed an opinion. That opinion rested not upon rumor or mere newspaper assertion, but upon a report of the sworn testimony given on the trial. Necessarily, such an opinion was neither hypothetical nor contingent. The very same testimony was likely to be repeated, and the juror would hear it with its result already lodged in his mind. Nothing of that kind was true in the case at bar. The jurors here had read the newspapers and formed the ordinary opinions created by their perusal. The opinions were hypothetical, known to depend upon the truth of what had been read, and left the jurors able to declare that they could discard those opinions and try the issues between the people and the prisoner, impartially and without bias. We

think the court correctly decided that the jurors were competent, and as, therefore, it cannot be said that an erroneous decision compelled the accused to resort to his peremptory challenges, the further question of his right to interpose them anew, although in fact fully exhausted, has no foundation left upon which to rest, and need not be determined.

The appellant complains that he was not allowed to prove the intent of Davidson in making out the bill alleged to be false. The court did not exclude the facts which occurred, or the statement of the witness made at the time to Genet of what his purpose was. His intent as communicated was, perhaps, material, and was therefore admitted. His intent known only to himself could in no manner affect Genet, and no view of the case has been suggested in which it is at all material. Practically, however, the witness was permitted, in stating what occurred, to develop his intention, which was to have Genet collect the bill, so as to be ready to pay for the iron on delivery. The objection, therefore, to the ruling was not well taken.

Upon the cross-examination of Davidson, the defendant's counsel, while seeking to elicit new matter constituting an element of the intended defense, claimed the right to put leading questions, which was denied by the court. The rule in such case was very fully and ably discussed in the opinion of Judge BRADY at General Term, and the authorities cited. (*Harrison* v. *Rowan*, 3 Wash. C. C. 580; *Ellmaker* v. *Buckley*, 16 Serg. & R. 77; *Phil. & T. R. R. Co.* v. *Stimpson*, 14 Pet. 448; *Castor* v. *Bavington*, 2 Watts & Serg. 505; *Floyd* v. *Bovard*, 6 Watts & Serg. 75; *Jackson* v. *Son*, 2 Caines, 178; *People* v. *Moore*, 15 Wend. 419.) The conclusion reached, that such right does not exist, meets our approval. A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given

in behalf of the adversary. When it passes beyond that it becomes the direct and affirmative evidence of the party, and should be subjected to the appropriate restraints. There is no reason in the nature of the case, why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defense. We see no error in the ruling of the court in this respect.

Objection is made to the range of cross-examination allowed to the prosecution as it respected the evidence of both Scallon and Genet. In both cases it was searching and severe, and extended over a wide area of subjects and circumstances, and is claimed to have wandered far away from the precise issues involved, and to have seriously and unjustly prejudiced the case of the defendant. Our control over such an alleged error is not absolute. As a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character. (*The People* v. *Brown*, 72 N. Y. 571; *Ryan* v. *The People*, 79 id. 594; *The People* v. *Crapo*, 76 id. 290.) If this limitation is not disregarded we can only interfere where there has been an abuse of discretion. (*Great Western Turnpike Co.* v. *Loomis*, 32 N. Y. 127; *LaBeau* v. *The People*, 34 id. 230; *People* v. *Casey*, 72 id. 393.) Our only inquiry, therefore, in the present case is, whether the cross-examinations, especially of Genet, went beyond the prescribed limit, or if not were pushed so far as to amount to an abuse of discretion. The question was raised by a general objection permitted to be made in advance to every question put on the cross-examination. We cannot encourage that mode of objection. We can only treat it in the same broad and general way, which characterizes the manner of the objection. Very much of the cross-examinations both of Scallon and Genet sprang naturally out of the real issues in the case, and especially out of the defense interposed. Genet claimed that after collecting the amount of the false

bill he offered it to Davidson, who declined to receive it, and then gave it to Scallon, telling him that he must get the iron elsewhere, and the latter testified that he did expend the money for the benefit of the city. In answer to all this the cross-examination aimed to show the falsity of the defense, and for that purpose the relations of Scallon and Genet, the payments of money to the former, the concurrent erection of Genet's house and the alleged use by Scallon of the city's black walnut in Genet's stable, the statements and explanations made by the latter elsewhere, all became the natural and proper subjects of inquiry. So far as Genet was concerned his relation to the commissioners and influence over them was an important element in the case of the prosecution, and hence his large receipt and disbursement of court-house moneys without apparent authority, the large salary paid him for merely nominal services, the appointment of relatives to positions under the commissioners through his influence and recommendation, and the like class of facts tended to show who it was that could procure the indorsement of a false bill, and who it was that sent it on its mission. These two classes of facts, pertinent to the real issues on trial, cover the main and principal range of the cross-examinations. Others, but much fewer in number, tended to discredit or contradict the witnesses. Looking the cross-examinations all over, considering the peculiar and somewhat novel character of the case, we cannot say that the limit of subject or of just discretion was exceeded, or that any wrong was done to the accused. A party who seeks to testify in his own behalf must take the risk if there are vulnerable joints in his harness.

Some other objections were raised which we have examined but do not deem it necessary to further discuss. We discover no error in the proceedings, and the conviction must be affirmed.

All concur.

Order and conviction affirmed.

Statement of case.

CHRISTINA ECKHARDT, ALIAS, ETC., Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

An indictment under the statute providing for the punishment of any person who "shall administer to any *pregnant woman*" any medicine, etc., to cause a miscarriage, is sufficient, where instead of using the words "pregnant woman" it charges the offense to have been committed upon "a woman with child."

It is not essential in an indictment for a statutory offense to employ the precise words of the statute, it is sufficient to state all the facts constituting the offense, so as to bring the accused precisely within the statutory provisions.

(Submitted December 16, 1880; decided January 18, 1881.)

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment entered upon an order made November 26, 1880, affirming a judgment of the court of general sessions in and for the city and county of New York, convicting the plaintiff in error, under an indictment, the substance of which is set forth in the opinion. (Reported below, 22 Hun, 525.)

William F. Kintzing for plaintiff in error. The indictment is fatally defective in not averring that the woman upon whom the abortion was attempted was "pregnant." (3 R. S. § 11, p. 932 [6th ed.]; *People* v. *Allen*, 5 Den. 79; *People* v. *Taylor*, 3 id. 93; *People* v. *Wilbur*, 4 Parker Crim. Rep. 20; *People* v. *Wood*, 53 N. Y. 511; 1 Chitty Crim. Law, 281, 282, 283 [ed. 1841]; Archb. Cr. Pldg., 50 [ed. 1846]; 2 Colby Crim. Law, 113; *The U. S.* v. *Mills*, 7 Pet. 142; *The U. S.* v. *Cruickshank*, 2 Otto [S. C. Rep.] 542; *The U. S.* v. *La Costa*, 2 Mason, 127–141; *The U. S.* v. *Lancaster*, 2 McLean, 43; *Commonwealth* v. *Danils*, 2 Virg. Cas. 402; *State* v. *Stanton*, 1 Iredell [N. C.] 424; *Rex* v. *Pemberton*, 2 Burr. 1035; *Reg.* v. *Johnson*, 10 Cox, 14.) Certain technical terms must be inserted in all indictments, as descriptive of the offense, and they are as essential now as at common law. (1 Colby Crim. Law, 386, 389; 1 Archb. Crim. Pl. 1039; 2 Whart. Am. Crim. Law, 930.)

Opinion of the Court, per RAPALLO, J.

Daniel G. Rollins for defendant in error. The use of the words in the indictment, "a woman with child," instead of those used in the statute, viz., "any pregnant woman," did not render it defective. (1 Bishop's Criminal Procedure, § 612 [2d ed.]; 3 Bank's Stat. [6th ed.], p. 1022; Worcester's and Webster's dictionaries, under heading "child;" 3 Macauley's History of England, 133; The Tempest, act 1st, scene 2d; Measure for Measure, act 2d, scene 3d; id. act 3d, scene 2d; Merchant of Venice, act 3d, scene 5th; All's Well That Ends Well, act 4th, scene 3d; First Henry the VI, act 5th, scene 4th; Pericles, act 3d, induction; Genesis, 38, 25; 1st Samuel, 4, 19; 2d Kings, 15, 16; Ecclesiastes, 11, 5; Isaiah, 26, 17; Exodus, 21, 22; Hosea, 13, 16; II Kings, 8, 12; Amos, 1, 13; Matthew, 1, 18, 23–24; Mark, 13, 17; Luke, 21, 23; Revelation, 12, 2.)

RAPALLO, J. This case comes up on writ of error on the judgment record alone, and the sole error assigned is that the indictment is defective.

The statute under which it is framed (3 R. S. 932, § 11), [6th ed.], provides for the punishment of every person who shall administer to any *pregnant woman* any medicine, etc., or shall use or employ any instrument or other means whatever with intent thereby to produce the miscarriage of any such woman. The indictment charges that the prisoner used and employed an instrument upon the body and womb of one Minnie Pape, she being then a woman with child, with intent thereby to produce her miscarriage. The alleged defect consists in describing the patient as a woman then with child, instead of describing her in the words of the statute as a "pregnant woman."

The counsel for the prisoner cites authorities showing that in indictments for statutory offenses, it is in general sufficient to charge or describe the offense in the words of the statute, but these authorities do not establish that it is indispensable to employ the precise words. The indictment must state all the facts constituting the statutory offense so as to bring the accused precisely within the provisions of the statute. (*People* v. *Allen*,

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5 Den. 79; *People* v. *Taylor*, 3 Den. 93.) But the pleader need not employ the identical words; he may, if he choose, use words which are their equivalent in meaning. (Bishop's Crim. Proc., vol. 1, 612 [2d ed.].

It cannot be doubted that the words, "a woman with child," are in their ordinary sense synonymous with "a pregnant woman." They are a definition of the shorter term. It is conceivable that they might be used in a different sense, and so might the word "pregnant" be employed in such a connection as not to denote pregnancy with child. But certainly in the connection in which the words are used in this indictment they can have no other meaning than that the woman was pregnant with child, and the instrument was used to produce a miscarriage. It is scarcely necessary to call in the aid of the statute of jeofails to sustain the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

EDWARD COWLEY, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Plaintiff in error was indicted under the provision of the act "to prevent and punish wrongs to children" (§ 4, chap. 122, Laws of 1876), which declares it to be a misdemeanor for one "having the care or custody of any child" to cause or permit the child's life to be endangered or health to be injured, etc. The charge was that the accused willfully neglected to provide the child named, of whom he had the care and custody, with proper and sufficient food, clothing and medicine; thus causing his health to be injured. It appeared on trial that the accused was the secretary of a benevolent institution, having a board of trustees and subject to visitation of the Supreme Court and the State Board of Charities and Corrections. He was, however, in actual charge, provided for the household, and was the director of all its internal affairs, and had the actual care and custody of its inmates. *Held*, that he had the care and custody of the child within the meaning of the statute.

The court declined to charge that the prisoner had no right to receive and distribute the revenue provided by the legislature for said institution.

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It did not appear that the ability to supply more and different food or other needful things depended upon that revenue, but it appeared that he had other means in his power to use. *Held*, no error.

The court charged that if the prisoner took the child into his care and custody the law imposed upon him the duty of giving him food, clothing, care and medical attendance reasonably necessary and proper to keep his life from danger and his health from injury. Also, that if he did not have the means to provide what was needful for the child, it was his duty to apply to the public authorities for aid; and that if the prisoner neglected so to do and life was endangered or health injured he was guilty. *Held*, no error.

One who, with no natural or legal duty, voluntarily seeks and assumes the care and custody of a child, is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody.

Reg. v. *Chandler* (Dearsley's Cr. Cases, 453), and *Reg.* v. *Downes* (1 Q. B. Div. 25), distinguished.

In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist.

The indictment charged the offense to be on a day specified; the proof was of continuous acts and omissions in giving the child insufficient food; no one specific act was shown to have been done on any given day. *Held*, that the statute did not require the offense to be made out by proof of an act on any particular day; that the indictment was good averring the offense on a day specified, and proof of repeated and continuous acts or neglects connected in operation resulting in the effect condemned by the statute was sufficient to sustain the indictment.

The prosecution offered in evidence photographs of the child, one taken before he went to the institution, and others taken about two weeks after he was taken away. It was proved that said photographs were accurate pictures as the child appeared at the times they were taken; also, that the child improved in condition after he was taken from the prisoner's custody and before the last photographs were taken. These were received under a general objection. *Held*, no error.

Photographic pictures when shown to be correct resemblances of the person or thing represented are competent as evidence.

Hynes v. *McDermott* (82 N. Y. 41), distinguished.

(Argued December 16, 1880; decided January 18, 1881.)

ERROR to the General Term of the Supreme Court, in the first judicial department, to review judgment entered upon an order made June 11, 1880, affirming a judgment entered

upon a verdict convicting the plaintiff in error of a misdemeanor. (Reported below, 21 Hun, 415.)

The particular offense charged and the material facts appear in the opinion.

Charles Cooley for plaintiff in error. As "the active manager and representative" of the corporation which had the care and custody of the boy, the plaintiff in error did not come within the meaning of the act under which he was indicted. (*Ferrett* v. *Atwill*, 1 Blatch. 151; *U. S.* v. *Sheldon*, 2 Wheat. 119; *Daggett* v. *State*, 4 Conn. 61; R. S. title 7, § 8; title 8, chap. 1, §§ 8, 18, 19.) The fact that the person charged with this offense has the means of doing what the act requires, is a necessary ingredient in this offense, and must be both alleged and proved. (*Regina* v. *Chandler*, Dearsley's C. C. 453; *Queens* v. *Downs*, 1 Q. B. Div. R. 25, in 1875.) It was error to charge that if the plaintiff in error did not have the means, etc., it was his duty to apply to the public authorities for relief. (*Comm.* v. *Green*, 1 Ashmead, 289; *People* v. *Brooks*, 1 Den. 457; *Comm.* v. *Kirby*, 2 Cush. 577.)

Daniel G. Rollins for defendant in error. The photographs of the child showing his condition at the time he was taken from the custody of the plaintiff in error were properly received in evidence. (*Ruloff* v. *The People*, 45 N. Y. 213; *Cozzens* v. *Higgins*, 1 Abb. Ct. of App. Cas. 453.) Any offense which is of such a nature that it may either be committed upon a single day, or continue over several days, may properly be described in an indictment as having been committed on a day certain; and such indictment will be sustained by proof that the various acts or neglects constituting the offense were committed or omitted upon a single day, or upon several days. (1 Bishop's Cr. Proc. [3d ed], § 397; *Regina* v. *Firth*, 11 Cox's C. C. 234; 1 Chitty's Crim. Law, 225 [star paging]; *Rex* v. *Bleasdale*, 2 Car. & Kerw. 675; *Reg.* v. *Welman*, Dearsly's C. C. 188; *Brown* v. *State of Ohio*, 18 Ohio St. 496; *The King* v. *Moore*, 2 Leach, 575.) The instruction

to the jury that the neglect must be found by them to be willful, that is knowing and intentional, was correct. (*The People* v. *Brooks*, 1 Den. 457; *Comm.* v. *Green*, 1 Ashmead, 299; *King* v. *Holland*, 5 Durn. & East, 618; *Reg.* v. *Bubb*, 4 Cox's C. C. 455; *Reg.* v. *Downs*, 13 id. 111; *Gardner* v. *People*, 62 N. Y. 299.) The charge that "if the defendant did not have the means to provide for the boy Louis Pictor, it was his duty to apply to the proper authorities, and if he willfully neglected so to do, he is guilty of the offense charged," was proper. (*Queen* v. *Mabett*, 5 Cox's C. C. 339; *Queen* v. *Downs*, 13 id. 111.)

FOLGER, Ch. J. An act of the legislature was passed in 1876, entitled "An act to prevent and punish wrongs to children." (See Laws of 1876, chap. 122, p. 95.) It enacts that whoever, having the care or custody of any child, shall wilfully cause or permit the life of it to be endangered, or the health of it to be injured; or it to be placed in such a situation that its life may be endangered or its health be likely to be injured, shall be guilty of a misdemeanor. (Id., § 4, p. 96.)

The plaintiff in error was indicted under this statute. We have to do with but two of the counts in the indictment, the first and the second. The first charges that he wilfully neglected to provide a child known as Louis Kulkusky, *alias* Louis Victor, with, and to give to him, proper, wholesome and sufficient food, clothing and means of cleanliness, and thereby did wilfully cause and permit his health to be injured. The second charges that he did wilfully neglect to provide the child with, and to give and administer to him, proper and sufficient medicine and medical attendance when the child was sick, diseased and ailing and requiring the same, and did wilfully cause and permit his health to be injured. Each of these two counts charge that the plaintiff in error then had the care and custody of the child. They allege the neglect to have been on a day named. On the trial of the indictment the jury found the plaintiff in error guilty. No question is made by the plaintiff in error but that the wilful deprivation of suf-

ficient food, in quality, kind and quantity, and of needed medicine and medical attendance, are within the meaning and intention of the fourth section of the act, as we have given it above.

1. The first question that arises on the points made and argued in this court for the plaintiff in error is, that he does not come within the words of the act, "whoever having the care and custody." It is argued that he did not have the care and custody of the child. It seems that the plaintiff in error was the secretary of a benevolent institution duly incorporated, known by the name of "The Shepherd's Fold." It had a board of trustees. It was subject to the visitation of the Supreme Court and of the State Board of Charities and Corrections. It seems, however, that the plaintiff in error was in the actual charge of the house and the household in which the child dwelt. He was the head of the household, the provider for it, the authoritative director of all its internal affairs. Nearly every practical act in the management and conduct of it was done by him or was under his guidance. Had he given charge that the child should have other or more food, different or more raiment, more frequent administration of medicines, or medical attendance, they would have followed. What the child had of these, and that he had no more than he did have, was in conformity to his rules and because of his directions. The care of the household and its inmates, the custody of them, centered in him. He was the master there, and others were under him. It is idle to claim that the actual physical care and custody of the child was not in him, as the practical arbiter of the daily routine of the house and the family. True, penal statutes must be construed strictly when against the accused person. The letter of the act may not be extended by implication or equitable construction. But even in penal laws, the intention of the legislature is the best method to construe the law; though truly, that is to be deduced from all the words that it uses. (*Heyden's* case, 3 Co. 18, 19, *n.* B.) We think that when the legislature said that whoever, having the care or custody of any child, shall wil-

fully permit the life of such child to be endangered, it meant by those words a sentient being who could will and do of his own good pleasure; and that such a one is not without the close purview of the act, because an officer of a corporation, an artificial entity that cannot will or do, save through sentient beings. It may be conceded that the legal control of the child was in the corporate body, which was the ultimate depositary of power and authority over it, and which could, through its board of trustees, supersede the plaintiff in error in the actual control, care and custody of the boy. But we notice that in the first section of the act the legislature has used the word "control" in the alternative with the word care and with the word custody; and in such juxtaposition with other phrases as to convey the idea of a legal power to direct and dispose of without an actual physical care and custody. It has been thought that a corporation aggregate could not be indicted for a misfeasance, for that it could not be liable for a crime of which a corrupt intent, or *malus animus*, was a part. (1 Arch. Cr. Pr. and Pl. 51 [*9], note 1.) But in later days it has been held otherwise. (Id.) It has, however, for years been the law of this State that the officers of a corporation might be indicted for the neglect of a duty resting upon it. (*Kane* v. *The People*, 3 Wend. 363.) Clearly the plaintiff in error did have the actual immediate physical care and custody of the child. The jury have so found, and they have also found that he did wilfully permit the health of the child to be injured. The case of the plaintiff in error, in our judgment, is within the words of the statute, it not being questioned by him that the conduct charged against him is within the meaning of the fourth section.

2. It was not error for the learned recorder to decline to charge that the plaintiff in error had no right to receive or distribute the revenue provided by the legislature. The request so to do presented an immaterial issue. It was not in proof that the ability to supply more and different food or other needful things depended upon that revenue. Donations by the charitable and payments directly to the plaintiff in error from some

of the relatives of children were some of the means in his power of use. Nor is the excuse set up by him that there was not enough in quantity and variety of provisions in his reach; while it is shown that the services of Dr. Hawes were gratuitous. Nor was it error for the learned recorder to say to the jury, that it appeared that the plaintiff in error received the boy from his father and undertook the care and custody of the child. If it is excepted to as a legal proposition, what we have said covers that. If it is excepted to as passing upon a question of fact by the court, it is plain that it was not so appreciated by the jury. The court was abundantly cautious to tell the jury again and again that the questions of fact were for them. And, at the request of the plaintiff in error, it did instruct the jury that if they found that the child was in the custody of the corporation, and not solely in the personal care and custody of the defendant, they must acquit the defendant.

3. Another question raised is as to the admissibility of the hypothetical questions put to medical experts sworn as witnesses. The claim is that a hypothetical question may not be put to an expert unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury; and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice. (*Erickson* v. *Smith*, 2 Abb. Ct. App., Dec. 64; *The People* v. *Lake*, 12 N. Y. 358; *Seymour* v. *Fellows*, 77 id. 178.) This subject has been under our consideration in *Guiterman* v. *The Liv., N. Y. & Phil. S. S. Co.*,* decided at this term, and needs no further discussion in this case. It was not error to take the questions.

4. Another point made in this court arises in this wise: The indictment charges the offense to have been on a specific

* *Ante*, p. 358.

day, the 26th of December, 1879. The proof was of a continued course of conduct, consisting in the giving to the child food insufficient in quantity and unvaried in kind, and like continuous acts or omissions. There was no one act specifically shown by the proofs, that was proven to have been done on any given day. It is claimed that the fourth section of the statute requires that an act, to make out the offense declared by it, should be done on some one day. Doubtless one might cause the life of a child to be endangered, or its health injured, as are the words of the section, by a single act; as by putting him to ride upon a vicious and ungovernable horse, or by putting him to tend a dangerous piece of machinery. That could be done on a single day. Doubtless, also, he might cause the same by a course of conduct made up of successive acts or negligences; as by putting him at menial service in a pest-house and keeping him there, or by continuously exposing him to the rigor of the seasons with a lack of clothing. That might run on for many days. Both the single act and the course of conduct might endanger life or injure health; and if one is within the purview of the statute, why is not the other? Take then the other word of the statute — "permit." It conveys exactly the idea of what is claimed to have been shown by the facts in the case, and what we must, from the verdict, assume was shown to the satisfaction of the jury. There was an allowance, a sufferance, a toleration, an authorization by the plaintiff in error of a routine of diet that the medical witnesses pronounced injurious to the health of children. With the care and custody of the child in his hands, and with the power to change that routine, and with the duty of knowing that it ought to have been changed, he suffered it to go on; he started it and (*per* and *mitto*) he sent it through the course of the days and weeks and months during which the boy was with him. We think that the point is not well taken, that the statute requires that the offense be made out by proof of an act on a given day.

Akin to this point is the other, that the evidence was wholly insufficient legally to warrant the jury, under any circumstan-

ces, in rendering any verdict save one of acquittal; and that the court should have directed the jury to acquit. It is true, the indictment does aver as the time a given day, the 26th day of December, A. D. 1879, and it is argued that the evidence should have shown a guilty act or omission on that day, and on that alone, or the offense is not made out. As a general rule, the time laid in an indictment is not material. (*The People* v. *Van Santvoord*, 9 Cow. 655; *Jacobs* v. *Comm.*, 5 S. & R. 316.) And hence evidence may be given of an offense done on another day. It is also said, that where the offense consists in neglect or non-performance, the allegation of a specific day is good, and the allegation of divers other days renders the indictment bad only as to to those days uncertainly alleged, leaving it effectual as to the day specified. (2 Hawkins' P. C., chap. 25, § 79; Starkie's C. P. 60–61; 1 Chit. Cr. Law, 218, 180.) These authorities are cited and approved in *People* v. *Adams* (17 Wend. 475). And see *Rex* v. *Dixon* (10 Mod. 335–338; *U. S.* v. *La Coste*, 2 Mason, 129). The offense in this case does not consist of a single act, or a single omission. From its nature it is made up of a continuity of acts or of omissions, neither of which may be enough by itself, but each of which comes in with all the rest to do the harm and make the offense. In such case, an indictment is good that avers the offense on a given day, and the proof sustains the averment, when it shows repeated and continuous acts or neglects connected in operation, the result of all of which is the act or effect reprehended by the law. (1 Bishop's Cr. Pro., book II, chap. XVIII, § 248 and note 1; 1 Chit. Cr. Law, * 225; 1 Starkie Cr. Pl. [2d ed.] 57.)

We think that this point is not well taken. There was testimony of what was the food given to this boy from day to day; there was testimony that it was not enough in quantity or variety for the healthy nutrition of a growing child; there was testimony of the state of body and of mind in which the lad was found, after months of feeding thus; and that that state was a result of that feeding. We express no opinion whether or no this testimony was overborne by other in the case. That was for the triers of fact. It was proper to submit it to them.

Opinion of the Court, per FOLGER, Ch. J.

It seems from the error-book, that the motion to direct an acquittal was to some extent put upon the ground that the medical testimony presented an alternative, to wit, that the state of the boy might have come from insufficient food, or from incapability of his system to well assimilate food. True, the medical experts did admit the possibility of the latter; but yet it was for the jury to say where lay the strength of the probability, and of the reason for it. Having passed the question of the care and custody of the boy being in the plaintiff in error, and the question whether the statute and the indictment required proof of some act on a given day, then, on the conflicting testimony, these were pure questions of fact, whether the boy was suffering to the point of injury to his health for the want of proper food, and whether the lack of food was wilfully caused by the plaintiff in error. The court was right in leaving those questions to the jury.

5. The learned recorder told the jury that if the plaintiff in error took the child into his care and custody, the law imposed upon him the duty of giving such food, clothing, care and medical attendance, as was reasonably necessary and proper to keep the life of the child from danger, and his health from injury; and that if he intentionally neglected to do it, and life was thereby endangered or health injured, he was guilty under the first two counts of the indictment. It is made a point, that this instruction is erroneous, in that it did not state that there was no duty to give food without the means of procuring food. We do not think that in this case there was need of the addition to the instruction that is insisted upon. There is a difference between a natural duty, or a duty imposed by operation of law, and a duty assumed voluntarily and that may be put off voluntarily. A father, who has the care and custody of a child by law of nature, and whose duty to provide for it is correlative, may perhaps say in excuse of non-performance, when indicted at common law for neglect, that he had not the means to get food for the child or himself. Or a relative, who takes a child bereft of parents, into his care and custody, because of the ties of blood, may perhaps, in such case, make the

same excuse. In *Hogan's Case* (2 Den. Crim. Cas. 277), it is recognized, that had the charge been the common-law offense of neglecting to provide for a child so as to injure its health, there must have been averment and proof of means of support. But one, who with no natural or legal duty, voluntarily takes, nay, seeks for the care and custody of a child, must either do his duty to it in giving it food, or must yield to others, or to the public, the care and the opportunity to feed, or he becomes amenable to this statute, which makes no mention of having means of support, as an ingredient of the offense created. Though he may not have the money wherewithal to buy bread and meat for it, he has the right to seek the charity of the kind-hearted, or if he will not do that, to ask for the public alms that the law of the State provides for all its poor. Having undertaken to care for the life and health of the child, he cannot excuse himself therefrom by the plea that he had not counted the cost, that he made an improvident promise. He must bestir himself to get means, or must give up the care that he is unable to keep as it should be kept, and which he is not bound to keep to the harm of the subject. The case of *Reg.* v. *Chandler* (Dearsley's Crim. Cas. 453), does not conflict with this view. There the indictment was for the common-law offense, and the allegation was that the prisoner was able and had means to maintain her child, but there was no proof to sustain the allegation. In *Reg.* v. *Downes*, (1 Q. B. Div. 25), though one of the specific questions put to the jury and found affirmatively, included the having of means by the prisoner, yet the judgment puts no stress upon that fact, nor does the statute, upon which the indictment was based, require it. It has been said by MARTIN, B., and ERLE, J., in *Reg.* v. *Mabbett* (5 Cox's Crim. Cas. 339), that it is the bounden duty of all persons having children, when they themselves cannot support them, to endeavor to obtain the means of getting them support; and that if they will wilfully abstain from going to the Union (i. e. the alms-house), where they have by law a right to support, and the children die, they are criminally responsible. That was a case of a mother indicted for manslaughter of a

child, by not giving it enough food. Besides there was no pretense in the case in hand, that there was a want of means, or of proper provision in the household. On the contrary, the testimony tended strongly to show that there was in the house the material for giving to the child, just that which the medical testimony showed he should have had. The instruction, the lack of which is complained of, would have been pointless, because immaterial. The court did not err in the instruction as given. What we have said covers the exception to that part of the charge, in which the learned recorder told the jury that if the plaintiff in error did not have the means to provide what was needed for the child, it was his duty to apply to the proper public authorities for public aid. The institution of which the plaintiff in error was an officer, and which was in great measure set on foot by him, was professedly a benevolent and charitable one. Its avowed purpose was to feed, clothe, and rear the needy, in the main gratuitously. It does not answer a charge, that having assumed to do this, it was not done and was wilfully neglected, to say that "the plaintiff was not obliged to resort to mendicancy." He was bound to do that which he undertook to do; and if the charitable means at his disposal failed, it was not mendicancy to go to the ordained public supplies, to eke out his lack. The charge was not, that having taken the boy, that was the duty of the plaintiff in error rather than that health be injured, and that he could not do his duty but thereby; the charge applied to the facts of the case, and took them all in its grasp, and held out the idea, not only of taking the care and custody, but of holding on to it, rather than when there came inability to do it well, giving it up to the public authorities, or getting from them aid to do it.

6. It is also made a point that it does not appear in the case, that the plaintiff in error knew of the fact that the lad was suffering for lack of food enough and proper. True, no witness testifies directly to that knowledge. But the jury were charged, that the indictment averred that the conduct of the plaintiff in error was wilful; and that by that term was meant knowingly and intentionally to cause the result; and that the

intent must be proved to their satisfaction. We must assume that the jury obeyed the law as thus laid down, and did find that the plaintiff in error kept on in his course of conduct toward this child, conscious that a continuance of it would endanger life or injure health. And we cannot say that there was no testimony to that end.

7. On the trial, the people offered in evidence, pictures taken by the photographic process. One picture was claimed to be that of the boy Louis, before he went into the care of the plaintiff in error. Others were of him about two weeks after he had been taken from the custody of the plaintiff in error and to St. Luke's Hospital. They were offered to show the bodily appearance of the child at the several times of taking the pictures. The first one was proven to be a correct likeness of him, a perfect picture of him when he came to this country. The photographic operator who took the others, testified that he was a photographer, doing that business in New York city; that he took them about the sixth of January, which was about two weeks after Louis was taken to the hospital; that they were exactly correct likenesses of Louis, as he appeared at the time of taking them. The house physician at the hospital, testified that the last taken pictures represented the child as he appeared at the hospital, only that from the position in which the pictures were taken, they did not show the emaciation as great as it really existed. Another medical witness, who saw and examined the child a while after the last pictures were taken, testified that they were about correct. Another such witness testified that they were correct. It was also in evidence that the boy improved in condition after he was taken into the hospital, so that the fair inference is, that if the pictures were a correct likeness of him when taken, they did not show a worse appearance of him than it was when he left the house of the plaintiff in error.

The plaintiff in error objected to the reception of these pictures in evidence. The objection made was general, and did not state the grounds upon which it rested. We must assume that the ground was either general, that photographic pictures

may never be properly received in evidence, or special, that these pictures were not, for some reason peculiar to them, competent evidence. As to the latter, as we have seen, there was evidence that they brought into court a faithful likeness of the boy as he appeared when they were taken; and that though they were taken at a lapse of days after he left the custody of the plaintiff in error, he had in that lapse bettered in physical condition, so that his appearance then was more favorable to the plaintiff in error, than it was on the day on which he was taken to the hospital. Nor were they offered for other purpose than to show the appearance of the subject, as it was presented to one looking upon him; in other phrase, to show a physical fact, that the eye of any human being, looking upon the boy, could have taken in. So far as the circumstances of the taking of these pictures, and the purpose of them in evidence were concerned, in our judgment they were properly received, if copies of objects taken by that process are ever competent in evidence. And we are now to consider whether they are, under a proper state of facts, and for a proper purpose, competent evidence. We know not of a rule, applicable to all cases, ever having been declared, that they are not competent. Nor do we see, in the nature of things, a reason for a rule that they are never competent. We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence, that fugitives from justice are arrested on the identification given by them. "The Rogues' Gallery" is the practical judgment of the executive officers of the law on their efficiency and accuracy. They are signs of the things taken. A portrait or a miniature taken by a skilled artist, and proven to be an accurate likeness, would be received on a question of the identity or the appearance of a person not producible in court. Photographic pictures do not differ in kind of proof from the pictures of a painter. They are the product of natural laws and a scientific process. It is true that in the hands of a bungler, who is not apt in the use of the process, the result may not be

satisfactory. Somewhat depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. It is the skill of the operator that takes care of these, as it is the skill of the artist that makes correct drawing of features, and nice mingling of tints, for the portrait. Most of evidence is but the signs of things. Spoken words and written words are symbols. Once a deaf mute, born so, was presumed in law an idiot (1 Hale, 34); but later days look upon him as not incompetent to be a witness, if he in fact have understanding and knows the nature of an oath. (*Ruston's Case*, 1 Leach, Cr. Cas., 408.) He is now taught to give ideas to his fellow men by signs, and his deprivation of some of the common faculties of humanity does not exclude him from the witness-box. The signs he makes must be translated by an interpreter skilled and sworn. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person, we see not why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being open, like other proofs of identity or similar matter, to rebuttal or doubt. A witness who speaks to personal appearance or identity, tells in more or less detail the minutia thereof as taken in by his eye. What he says is a description thereof, by one mode of signs, by words orally uttered. If his testimony be written instead of spoken, and is offered as a deposition, it is a description in another mode of signs, by words written; and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or a photograph of the person, and it shows to him a correct copy of that person, if it produce to his view a correct description, which he testifies is a likeness, why may not that be given to the jury, as a description of the person by the witness in another mode of signs? The portrait and the photograph may err, and so may the witness. That is an infirmity to which all human testimony is lamentably liable. But when care is taken to first verify that the process by which the

photograph was taken was conducted with skill and under favorable circumstances, and that the result has been a fair resemblance of the object, the picture produced may, in many of the issues for a jury, be an aid to determination. Nor are the cases adverse to these views. In *Cozzens* v. *Higgins* (1 Abb. Ct. App. Dec. 453; *S. C.* (3 Keyes, 206), this court held a photograph competent to show the condition of a cellar floor, caused by the acts of one digging down on premises adjoining. In *Udderzook's Case* (76 Penn. St., 340) one was held competent to show the appearance of a man on a question of identity, and on the further question of the identity of a mangled dead body as that of the man. In *Ruloff* v. *The People* (45 N. Y. 213), this kind of picture was held competent on the question of identity of persons. In *Marcy* v. *Barnes* (16 Gray, 162), photographic copies, on an enlarged scale, of writings conceded to be genuine, and of writings disputed, were held competent for submission to the jury with the writings themselves, on a question of genuineness of handwriting. In *Hynes* v. *McDermott* (22 Al. Law Jour., 368*); this court, in a question of expert evidence by comparison of handwritings, held it incompetent to compare a photographic copy of a writing not produced in court, with a genuine writing before the court, the more so as the accurate resemblance of the photographic copy was not well enough shown.

In our judgment, the learned recorder did not err in taking the photographs into the evidence.

These views take in the questions made on the printed points, and the oral argument presented in this court. Some reference is made in the printed brief to the questions raised at General Term. It is not understood that any of them are renewed in this court, save what were formally presented to us at length.

We find no error of law calling for a reversal, and the judgment should be affirmed.

All concur, except MILLER, J., absent at argument.

Judgment affirmed.

* 82 N. Y. 41.

Statement of case.

John E. Parsons for respondents. Statements of the treasurer were not strictly admissible to prove that the company had collected and used the proceeds of the coal. (*Alexander* v. *Brown*, 6 Hun, 645.) Proof of what the president said in reference to the matter was not competent. (*Custar* v. *Titusville Gas Co.*, 63 Penn. St. 381; *R. R. Co.* v. *Decker*, 82 id. 119.) Corporations, like natural persons, are only bound by such acts and contracts of their agents as are done and made within the scope of their authority. (*Chicago, etc.*, v. *James*, 22 Wis. 194.) The powers of a corporation must be determined by construing the language of its charter neither strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. (*The Toll Bridge Co.* v. *The H. & R. H. R. R. Co.*, 17 Conn. 454; *Downing* v. *Int. Washington R. R. Co.*, 40 N. H. 230.) The execution of its powers must be by the directors, expressed by resolution or agreement; and no majority, however large, has a right to divert the funds to any purpose not consistent with, and growing out of its original fundamental joint intention. (*Kean* v. *Johnson*, 1 Stockt. 401.) A corporation is restricted, both to the thing allowed by the legislature to be done, and the mode prescribed for its exercise. (*The Farmers' Loan and T. Co.* v. *Carroll*, 5 Barb. 613, 649.) It has no power except what is given by its incorporating act, either expressly or as incident to its existence. (*Beatly* v. *Knowler*, 4 Peters, 152; *Brady* v. *The Mayor, etc.*, 20 N. Y. 312; *Jackson* v. *Brown*, 5 Wend. 590.) Whoever contracts with a corporation, through its agent, must inquire into his authority, and a corporation is bound only where its agents keep within the limit of their authority. (*Silliman* v. *Fredericksburg R. R.*, 27 Gratt. [Va. Ct. of App.] 120; *Custar* v. *Titusville Gas Co.*, 63 Penn. St. 381; *Huntington, etc., R. R. Co.* v. *Decker*, 82 id. 119; *Westervelt* v. *Radde*, N. Y. Com. Pleas, Oct., 1877.) The authority must be proved, either expressly or impliedly, from his conduct as sanctioned by his principal. (*Thurman* v. *Wells, Fargo & Co.*, 18 Barb. 500, 519; *Dougherty* v. *Hunter*, 54 Penn. 380; *Martin* v. *Farns-*

worth, 49 N. Y. 555; *Banks* v. *Aymar*, 3 Hill, 262.) The party claiming under the contract must show it to be within the powers of the officer alleged to have made it. (*Farmers' Bk., Buck Co.*, v. *McKee*, 2 Penn. St. 318; *Blue* v. *Bear River Co.*, 20 Cal. 602.) The contracting party is bound to take notice whether the agent is departing from the usage of trade. (*Eastern* v. *Clark*, 35 N. Y. 225–232.) Even a subsequent ratification by the directors of similar transactions will not render other contracts valid. (*McCullough* v. *Morse*, 5 Den. 567; *Dubois* v. *N. Y. & H. R. R. Co.*, 1 N. Y. Legal Observer, 362.) The claimant must show not only that the agent had authority to bind, but that the company had the faculty to become bound. (*Hardwood* v. *Haines*, 9 Ala. [N. S.] 659.) In order to a ratification, the principal must have knowledge of what the agent had done, and must unequivocally manifest an intent to ratify it. (*Kuber* v. *Salsbury*, 33 N. Y. 648.)

EARL, J. This action was commenced by the plaintiffs who claimed to be creditors of the New York Mutual Coal Company, a corporation formed under the laws of this State, against the defendants, trustees of the corporation, to enforce their liability to them, as such creditors, for omitting to publish and file the annual report required by section 12 of chapter 40 of the Laws of 1848, the act for the formation of manufacturing and mining companies.

The defendants defended the action on the ground that the plaintiffs had no claim against the corporation and whether there was proof sufficient to show that they did have is the only question which it is deemed important now to consider.

It was stated in the certificate of incorporation of the coal company that it was formed "for the purpose of working coal mines and the mining for coal in the mines situated on the De Long Tract, so called, in the township of Blythe, Schuylkill county, State of Pennsylvania, which shall be held by said company under leases, and the transporting to market and vending of said coal"; and in a prospectus issued by the com-

pany, the purposes and mutual character of the company were more fully disclosed. The coal was to be mined at the places indicated in the certificate of incorporation and transported and delivered to stockholders at actual cost, each stockholder being entitled annually to one ton of coal for every share of stock held by him, the shares being at the par value of ten dollars each; and if more coal should be mined than was needed on this plan to supply the stockholders, the balance was to be sold at market rates and the profits divided among the stockholders.

It was no part of the business of the corporation to purchase coal in the market and sell it to its stockholders or to others, or to sell coal to others except in the case of surplus not needed to supply its stockholders.

The coal company was organized in the latter part of the year 1865, and in the spring or summer of 1866 it commenced its mining operations in Pennsylvania on a small scale, and it brought, so far as the case discloses, but one boat load of coal to New York, and that was distributed to its stockholders. It had a president, Mr. Browne; a treasurer, Mr. Ball; a secretary, Mr. Neal, and a general agent, Mr. Carpenter. The powers and duties of these officers, so far as appears, were not defined by by-laws or resolutions of the board of directors. Their powers, so far as we know, were such only as may be inferred from the names of their offices. The business of the company, so far as it did any, was, in the main, managed by them. The company had an office in the city of New York where the secretary and treasurer, who were not directors, were generally present, and the president and directors were also occasionally there.

On the 30th day of June, 1866, Ball, the treasurer, addressed a letter under the heading "New York Mutual Coal Co." to the plaintiffs, who were retail coal dealers in the city of New York, in which he said: "We wish to make an arrangement with you to furnish us coal at as low price as possible, delivered to any part of the city we may direct, you collecting the bills in the name of our company, and we paying you the difference

due each month; also to deliver all coal from our mine as it arrives, and any balance left over to store in your yard, or in other words, your firm to act as delivery agents for our company." This letter the plaintiffs answered on the 2d day of July assenting, substantially, to the proposed arrangement.

Under this arrangement, upon orders issued by Neal and by Ball from the office of the company, the plaintiffs, between July 4th and August 10th, 1866, delivered coal to divers persons to the value of nearly $1,000, and this action is brought to recover the balance due them for this coal.

It does not appear that this coal was delivered to stockholders of the company or upon any contracts made by the company, and it does not appear what connection, if any, it had with the business of the company. It does not appear that these transactions were known to any director of the company, or that they appeared upon any books of the company, and it affirmatively appears that they were not authorized by resolution of the board of directors and that they were entirely unknown to a majority of the directors.

We have not here the question which would have to be considered if these transactions, outside of the legitimate business of the corporation, had been actually authorized by the board of directors. But we have the question whether the company was bound for this debt thus created by its secretary and treasurer assuming to act for it. We are of opinion that it was not.

Every one knows that corporations are artificial creations existing by virtue of law, and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed; and when he deals with agents or officers of one of them, he is bound to know their powers and the extent of their authority. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority (Angell & Ames on Corp. 288, 301.)

Here the plaintiffs were chargeable with knowledge that this corporation was organized for the purpose of mining coal and bringing it to New York for its stockholders or for sale.

They were chargeable with notice that it was no part of the legitimate business of the corporation to go into market and buy coal for sale again to others. And it was not, upon any facts here appearing, within the scope of any apparent authority conferred upon the secretary and treasurer to purchase this coal of the plaintiffs. It can never be presumed that an agent of a corporation had authority to transact business which the corporation itself was not, by its charter, authorized to engage in.

And this purchase of coal was not ratified by the company. It does not appear that this business was so carried on at the office of the company that any of its directors would have knowledge of it; nor does it appear that it was entered in the books of the company where they would receive notice of it. There was some evidence, by no means satisfactory, that the president of the corporation, now dead, had some knowledge of these transactions; but, even if he did have, it could make no difference, as he had no more power than the secretary or treasurer to bind the company in this illegitimate business.

We have not here the question we would have to consider if the corporation had actually had the benefit of this coal, by the receipt into its treasury of the proceeds thereof, because there was no competent evidence of such receipt. It is true that evidence was given, against the objection of the defendants, that the treasurer had admitted at some time, that he had received payment for the coal delivered by the plaintiffs, and had used it in the business of the company. But such admissions do not appear to have been made as part of any *res gestæ*, and they were not competent against the company and did not prove the fact of receipt by it. The fact, if important, should have been proved by calling the treasurer as a witness, or by the books of the company, or in some other legitimate way. He was unauthorized to buy the coal, and he certainly could not bind the company by afterward admitting that he had received and disbursed for the company the proceeds thereof. (*Soper* v. *Buffalo & Rochester Railroad Company*, 19 Barb. 310; *Niagara Falls Susp. Bridge Company* v. *Bachman*, 66 N. Y. 261; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1–29; *Allegheny*

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County Work-house and Inebriate Asylum v. *Moore*, in the Supreme Court of Pennsylvania, October 25, 1880.)

We are therefore of opinion that the plaintiffs did not establish any debt against the corporation, and hence that this recovery cannot be upheld.

The judgment should be reversed and new trial granted, costs to abide event.

All concur, except FOLGER, Ch. J., and ANDREWS, J., not voting, and MILLER, J., absent from argument.

Judgment reversed.

WILLIAM BUTLER DUNCAN et al., Appellants, *v.* MARGARET W. BRENNAN, as executrix, etc., Respondent.

Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance.

Nor can it be so held although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general account cannot be invoked.

Plaintiffs, who were bankers, loaned to B. Bros. & H. $10,000, upon the specific pledge of a quantity of whisky; this loan was paid in full. Prior and subsequent to this loan plaintiffs made other advances to said firm to a large amount. The whisky was levied on by B., defendant's testator then sheriff, under attachments, against M. On the trial of an action to recover possession of the whisky, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whisky was the property of M.; this evidence was excluded. *Held*, error, that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them.

Also, *held*, that as plaintiff had no right of possession at the time of the levy, a denial of a motion to dismiss the complaint was error.

(Argued December 20, 1880; decided January 18, 1881.)

APPEAL from order of the General Term of the Court of Common Pleas, in and for the city and county of New York, made February 3, 1879, reversing a judgment in favor of plaintiffs entered upon a verdict, and granting a new trial.

This action was brought to recover possession of three

hundred barrels of whisky alleged to have been wrongfully taken and detained by the original defendant, Matthew T. Brennan, then sheriff of the city and county of New York. He having died during the progress of the action, the present defendant, his executrix, was substituted.

The answer alleged that the property in question was owned by T. J. McGibbon, and justified the taking under and by virtue of attachments issued in actions against said McGibbon.

The evidence tended to show that plaintiffs, who composed a banking firm in the city of New York, loaned to Boyd Brothers & Hobson $10,000 on pledge of the bill of lading of said whisky, then *en route* for New York; on arrival the whisky was stored and the warehouse receipts delivered to plaintiffs. Plaintiffs' evidence was to the effect that the whisky was bought of and shipped to them by said T. J. McGibbon. It appeared that it was levied on by defendant's testator on February 23d, 1871, under attachments against and as the property of McGibbon. The said loan was paid in full March 9, 1871. It did not appear that there was any agreement that plaintiffs should hold the whisky for general advances or for any other loan. It did appear that both prior and subsequent to the loan so secured they advanced large sums to said Boyd Brothers & Hobson, sometimes on specific securities and sometimes on general account, and that said firm were indebted to them to more than the value of the whisky. Upon the trial defendant offered to prove the admissions of Boyd to the effect that the whisky belonged to McGibbon; this was objected to and excluded, to which defendant's counsel duly excepted. At the close of the testimony defendant's counsel moved for a dismissal of the complaint on the ground that plaintiffs had shown no title to the property and had not made out a cause of action, which motion was denied and said counsel duly excepted.

W. W. Macfarland for appellants. Admissions made under circumstances to render them technically evidence constitute evidence of the weakest character. (*Garrison* v. *Akin*,

Statement of case.

2 Barb. 25; *Ball* v. *Loomis*, 29 N. Y. 416; *Tousley* v. *Barry*, 16 id. 497; *Paige* v. *Cagwin*, 7 Hill, 361; *Wourall* v. *Parmelee*, 1 N. Y. 519; *Whitaker* v. *Brown*, 8 Wend. 490; *Jones* v. *East Society, etc.*, 21 Barb. 161; *Schenck* v. *Warner*, 37 id. 258.) The declarations of a person, who is in a situation to be called as a witness, can never be given in evidence. (*Bristol* v. *Dann*, 12 Wend. 142.)

A. J. Vanderpoel for respondent. The court erred in excluding the declaration of Mr. Boyd, touching Megibben's ownership of the whisky in question. (*Stief* v. *Hart*, 1 N. Y. 20; *Parish* v. *Wheeler*, 22 id. 494, 511; 1 Greenl. on Ev., §§ 171, 172; *Adams* v. *Davidson*, 10 N. Y. 312; *Cook* v. *Holt*, 48 id. 275; *Milliner* v. *Lucas*, 3 Hun, 496; *Cartwright* v. *Wilmerding*, 34 N. Y. 521; 3 R. S. [6th ed.] 625, part 3, chap. 6, title 5, art. 2, § 20; Old Code, §§ 231, 232, 463; *Thayer* v. *Willet*, 9 Abb. 325, 330; *McKay* v. *Harrower*, 27 Barb. 463, 469; *Ward* v. *Ward*, 37 Mich. 253; *Miles* v. *Walker*, 3 Mo. App. 96.) To authorize the plaintiffs to hold this whisky for advances other than the $10,000, a special agreement to that effect must be shown. (*Wilmerding* v. *Hart*, Hill & D. Supp. 305; *Robinson* v. *Frost*, 14 Barb. 536; 2 Bouvier's Law Dictionary [4th ed.], p. 339, Pledge, Pawn; Story on Bailments, chap. 5, §§ 304, 310, 348; 2 Kent's Com. 584 [orig. ed.], 775 [4th ed.]; *Jarvis* v. *Rogers*, 15 Mass. 389; *James' Appeal*, 89 Penn. 54; Story on Agency, §§ 380, 381; Grant on Banking [Law Library Series], 168; *Lucas* v. *Darrien*, 1 J. B. Monr, 29; *Thompson* v. *Dominy*, 14 M. & W. 403; *Vanderzee* v. *Willis*, 3 Bro. Ch. C. 21; *Ex parte Vere*, 4 Drac. etc., 321; *Neponsent Bank* v. *Leland*, 5 Metc. 259; 3 Pars. on Cont. 262 [orig. ed.]; Addison on Contracts, § 831; *Brandao* v. *Barnett*, 3 C. B. 530 [54 E. C. L. R.]; 12 C. & F. 787; *Wylde* v. *Radford*, 3 L. J. Ch. 51; *In re Meadows*, 28 id. 891; *Gilliat* v. *Lynch*, 2 Leigh, 509; *Bank of Metropolis* v. *N. E. Bank*, 1 How. [U. S.] 234; *Jarvis* v. *Rogers*, 15 Mass. 389; *Green* v. *Farmer*, 4 Burr. 2214; *Russell* v. *Haddock*, 8 Ill. [3 Gilman] 238; *Baldwin et al.* v.

Bradley, 69 Ill. 32.) The action being for the claim and delivery of personal property, there must be a present right to possession in the plaintiffs in order to maintain it. (*Redman* v. *Hendricks*, 1 Sandf. 32; *Ingraham* v. *Hammond*, 1 Hill, 353; *Pattison et al.* v. *Adams*, 7 id. 126.) In order to constitute a pledge at all, it is necessary that the pledgee have actual or constructive possession of the property pledged. (*Brownell* v. *Hawkins*, 4 Barb. 491, 493; *Folles* v. *Moore*, 24 Me. [11 Shep.] 219.) The defendant, even if a trespasser, was entitled to be allowed the warehouse charges for storage, cooperage and other incidental expenses for keeping the whisky in mitigation of damages. (*Plevin* v. *Henshall*, 10 Bing. 24; *Conly* v. *Fisher*, Taney, 121 [4th Ct. Md.].) The true measure of damages in cases like the present is the actual loss or injury sustained by the plaintiffs. (*Lamb* v. *Day*, 8 Vt. 407; *Board* v. *Hand*, 3 Dana [Ky.], 489; *Pierce* v. *Benjamin*, 14 Pick. 360; *Blake* v. *Johnson*, 1 N. H. 91.)

Per Curiam. The question whether the declarations of Boyd in respect to the ownership of the whisky were admissible depends upon the fact whether the plaintiffs had any claim or lien upon the whisky for advances made by them for Boyd Bros. & Hobson. The firm had loaned from the plaintiffs, and obtained an advance, of $10,000 on the bills of lading for the whisky, which loan was afterward paid to the plaintiffs, with interest, as plaintiffs' account, which was introduced in evidence, shows. The account also establishes that the money was received on this very loan of $10,000; and unless the plaintiffs had a lien for the unpaid balance of their previous account against Boyd Bros. & Hobson, the title of the whisky was not in them and the sheriff was justified in seizing the same. It appears that the plaintiffs had advanced large amounts to Boyd Bros. & Hobson, for which they held personal property as security; but these advances were not general and did not by any special agreement include the whisky. We think that the whisky could not be held for subsequent advances unless made upon this security, and of this

there is no evidence whatever. In this case the advance was a special one on specific personal property; and to entitle the plaintiffs to hold the whisky for any advances beyond the $10,000, a special agreement should be proved to that effect. (*Wilmerding* v. *Hart*, Hill & Den. [Supp.] 305; *Robinson* v. *Frost*, 14 Barb. 536.) As a pledge the whisky could not be held for any more than the debt, unless by special agreement. (Bouv. Law Dict.; 2 Kent's Com. 775.) Nor could the plaintiffs hold the same as bankers for a banker's loan, as the advance was made upon the whisky alone. The general lien which bankers hold upon bills, notes and other securities deposited with them for a balance due on general account, cannot, we think, exist where the pledge of property is for a specific sum and not a general pledge. (Story on Agency, §§ 380, 381; *Neponset Bank* v. *Leland*, 5 Metc. 259; Grant on Banking, 168; 3 Pars. on Cont. 262.) The plaintiffs, therefore, had no right to the property as a pledgee or by virtue of a lien as bankers; and as their lien had been paid in full before the action was brought, the firm of Boyd Bros. & Hobson was entitled to the same, and the declarations of Boyd were competent evidence, and the court erred in excluding the same. These declarations do not stand in the attitude of those of an assignor made after an assignment has been made, or of a mortgagor made before assignment, or a former owner of property, or of a chose in action, but rest upon the principle that the real owner or holder of property is bound by his own acts and declarations.

It also follows that from the fact that there was no general lien, and that the specific lien had been discharged by payment of the loan, there was no right of possession in the plaintiffs at the time the action was commenced; and for that reason the motion to dismiss the complaint should have been granted.

Without considering some other questions raised, the order of the General Term should be affirmed and judgment absolute ordered for the defendant upon the stipulation with costs.

All concur.

Order affirmed and judgment accordingly.

Statement of case.

JOSEPHINE S. DOUGLAS et al., Appellants, *v.* THE KNICKERBOCKER LIFE INSURANCE COMPANY, Respondent.

On October 1, 1868, defendant issued an endowment policy on the life of T. which contained a condition declaring it void in case the insured should "travel upon the seas," without the written consent of the company previously obtained. Upon the back of the policy was also a stipulation to the effect that if, after three or more annual premiums had been paid, the policy should cease "in consequence of the non-payment of premiums," the company would, upon its surrender, issue a new policy for the full value acquired under the old one. The annual premiums were paid up to, and including, the one due October 1, 1875. In September, 1875, T., without obtaining the consent of the company, and without its previous knowledge or subsequent assent, went to Spain. Plaintiffs, in August, 1877, offered to surrender the policy and demanded a paid up policy for eight-tenths of the amount of its amount, which was refused. In an action to enforce specific performance of such stipulation, *held*, that the policy and all rights under it were forfeited by the violation of said condition; and that even if a court of equity would, in any case, relieve against such a forfeiture, it was not authorized to do so here as it was not incurred by accident, ignorance, mistake, or any overpowering necessity.

Also, *held*, that the stipulation did not constitute a separate and independent contract, but was to be taken in connection with the provision in the body of the policy, all constituting but one contract.

Also, *held*, that the premiums paid were forfeited, although it was not so expressly provided in the policy.

In reference to certain other conditions, some of which were conditions subsequent, it was expressly stated in the policy that in case of their violation, the premiums should be forfeited. *Held*, that the absence of this express provision, in reference to the condition in question, did not justify an inference that such a forfeiture was not intended.

So, also, *held*, that the fact that as to certain other conditions it was expressly stated that its violation would work a forfeiture, "without notice" did not raise a presumption that the forfeiture here would not follow without notice, it appearing that there was an apparent purpose for the insertion of the express stipulation.

When the last premium was paid in October, 1875, defendant gave a receipt, using a printed blank in general use by the company, which stated, in substance, that the policy was thereby continued in force for one year, subject to a condition forfeiting it in case any obligation given for premiums should not be paid when due. *Held*, that this receipt did not have the effect to relieve from the forfeiture and continue the policy in force for the year, but only continued it so far as depended upon the payment of premiums.

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On the back of the policy was printed a statement that permits would be granted by the company "on reasonable terms" for persons insured "to make voyages to any foreign country." Itwas claimed by plaintiff that a forfeiture of the policy was not caused by a failure to obtain such a permit before the forbidden travel, but that the trial court should have ascertained what a reasonable charge would have been for the permit and have allowed it to defendant. *Held*, untenable; that the defendant could not only make a reasonable charge for a permit, but could impose other conditions; and the terms were so far in its discretion that unless it unreasonably refused a permit the court could not interfere; and as no permit was asked for, and the company was thus deprived of the opportunity to fix terms, there was nothing for a court of equity to act upon.

(Argued December 20, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 13, 1879, affirming a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term. (Reported below, 13 J. & S. 313.)

The nature of the action and the facts appear sufficiently in the opinion.

Robert Sewell for appellants. The actual agreement *inter partes*, in pursuance of which the appellants were to become beneficiaries under the policy of life assurance, issued to them by the respondent, did not contemplate a contract that was to be at the outset and remain throughout its career an entirety. (*Union Mutual Life* v. *Mowry*, 96 U. S. 547; *Worsley* v. *Ward*, 6 Term. R. 710; *Mutual Life* v. *Miller*, 39 Ind. 475; *Jennings* v. *Chenango Mutual*, 2 Denio, 75; *Patch* v. *Phœnix Mutual*, 44 Vt. 481; *Braunstein* v. *Accidental*, 2 Big. 610; Bliss on Life Ins., § 58; *People* v. *Utica Ins. Co.*, 15 Johns. 358; *Ins. Co.* v. *Gridley*, 100 U. S. 115; *Hay* v. *Star Fire*, 77 N. Y. 240.) Even if the original agreement be viewed as an entirety from the date of its making, it was severable on a possibility, and it actually became severed when the contingency (on which such severance depended) was favorably determined. (*Denbrow et al.* v. *McDonald*, 5 Bosw. 130; *Winne et al.* v. *McDonald*, 39 N. Y. 233; Story on Con-

tracts, § 25, d; *Badger* v. *Titcomb*, 15 Peck. 414; *Cooke* v. *Whormwood*, 2 Saund. 337; *Rudder* v. *Price*, 1 H. Blacks. 550; *Johnson* v. *Johnson*, 3 B. & P. 162; 2 Pars. on Cont. 528; *Chanter* v. *Leese*, 4 Mees. & Wels. 311; *Duke of St. Albans* v. *Shore*, 1 H. Blacks. 272; *Boone* v. *Eyre*, 2 W. Blacks. 1312.) To avoid the policy, for any other cause than the non-payment of annual premium and to make such avoidance binding on the beneficiaries, it was incumbent on the respondent to give them notice thereof, within a reasonable time thereafter. (*Ins. Co.* v. *Eggleston*, 96 U. S. 572; *Fifty Associates* v. *Howland*, 5 Cush. 214; *Rœhner* v. *Knickerbocker Life*, 4 Daly, 515.) Forfeitures are not favored in unilateral contracts. (*Frœlich* v. *Atlas Life*, 47 Md. 406.) The construction of forfeiture is *strictissimi juris*. (*Hoffman* v. *Ætna Life*, 32 N. Y. 414; *Catlin* v. *Springfield Fire*, 1 Sumner, 441; *McAllister* v. *N. E. Mutual*, 101 Mass. 855; *Kentucky Mutual* v. *Jenks*, 5 Ind. 103; *Knickerbocker Life* v. *Norton*, 96 U. S. 234, *Thompson* v. *St. Louis Mutual*, 52 Mo. 469; *Mutual Benefit Life* v. *Robertson*, 59 Ills. 123; *Home Life* v. *Pierce*, 75 id. 423; *Chicago Life* v. *Warner*, 80 id. 410; *Fowkes* v. *M. & L. Life*, 3 Best & S. 917; *Dilleber* v. *Home Life*, 69 N. Y. 256.) The surrender proffered of the old policy was the duty performed in time by, and the demand for a paid-up policy was of consequent right in the beneficiaries. (*Dorr* v. *Phœnix Mutual Life*, 67 Me. 438; *Shaw* v. *Republic Life Ins. Co.*, 69 N. Y. 287; *Haynes* v. *Am. Pop. Life Ins. Co.*, id. 435; *Hay* v. *Star Fire*, 77 id. 239; *Phœnix Mutual* v. *Baker*, 85 Ill. 414.) The original inchoate rights of election vested then in the beneficiaries, by virtue of their giving the first notice, and so determined the policy and any future election under it by the respondent. (*Flynn* v. *Equitable*, 78 N. Y. 568; Story's Eq. Jur., § 323; *Griffith* v. *Robins*, 3 Mad. 191; *Burke* v. *Rogerson*, 12 Jur. [N. S.] 635; S. C., 14 L. T. [N. S.] 780; *Hay* v. *Star Fire*, 77 N. Y. 202.) The first memorandum was a continuing policy up to the first day of October, 1876. (*Viele* v. *Germania Ins. Co.*, 26 Iowa, 9–74; *Frost* v. *Saratoga Mutual*, 5 Den. 154;

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Viall v. *Genesee Mutual*, 19 Barb. 440; *Sheldon* v. *Atlantic*, 26 N. Y. 460; *Carpenter* v. *Providence Wash. Ins. Co.*, 16 Peters, 509; *Welch* v. *Ætna Life*, 30 Iowa, 133; *Carroll* v. *Charter Oak*, 40 Barb. 231; 1 Abbt. Ct. of App. Cas. 316; *Mesereau* v. *Phœnix Mutual*, 66 N. Y. 278; *Globe Mutual L.* v. *Wolff*, 95 U. S. 329; *Wing* v. *Harvey*, 5 De G. M. & G. R., 265; 27 Eng. Law and Equity, 140; *Hodsdon Admx.* v. *Guardian Life*, 97 Mass. 144; *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U. S. 240; *Boehen* v. *Williamsburg Ins. Co.*, 35 N. Y. 131; *Ranson* v. *N. Y.*, 4 Blatchf. 157; *Mead* v. *N. Wm. Ins. Co.*, 7 N. Y. 530; *Bidwell* v. *Wm. Ins. Co.*, 19 id. 179; *Mutual Benefit* v. *French* [*Ohio*], 6 Ins. Law J. 550; *Ryley* v. *Ætna Ins. Co.*, 29 Barb. 557; 37 N. J. 469; *Young & Co.* v. *Hartford F. I. Co.*, 6 Ins. L. J. 547; 45 Iowa, 377; *Williamsburg City F.* v. *Carey*, 6 Ins. L. J. 492; 83 Ill. 453; *Ætna* v. *Maguire*, 57 Ill. 342; *West Rockingham Mutual Fire Ins. Co.* v. *Shiets & Co.*, 26 Gratt. 874; 2 Smith's Lead. Cas. Wallace's notes, 74; *Levy* v. *Peabody Ins. Co.*, 6 Ins. L. J. 773; *Ruse* v. *Mutual Benefit Ins. Co.*, 26 Barb. 556; *Buckbee* v. *U. S. Ins. Co.*, 18 Barb. 541.) The second memorandum of contract will be upheld as against all claims of forfeiture from any cause. (*Little* v. *M. Western Mutual*, 5 Bigelow, 141; 5 Rep. No. 9, p. 262; *Ohde* v. *N. W. Mutual*, 5 Big. 145; *Bonner* v. *Same*, 3 Cent. L. J. 801; *Dutcher* v. *Brooklyn Life*, 2 id. 801; *St. Louis Mutual* v. *Greigsby*, Ct. of Appeal [Kent], 4 Big. 636–8; *Thompson* v. *St. Louis Mutual*, 52 Mo. 469; *Moses* v. *Brooklyn Life*, 50 Ga. 196; 5 Big. 67; *McAllister* v. *N. Eng. Mutual*, 101 Mass. 561; *Hull* v. *North-Western Mutual*, 39 Wis. 397; *Kirkpatrick* v. *Knickerbocker Life*, 6 Ins. L. J. 368, Tenn. 75; *Wheeler* v. *Conn. Mut. Life*, 16 Hun, 317, 331; *Post* v. *Ætna Ins. Co.*, 43 Barb. 351.) The time for the surrender of the old, and the delivery of a paid-up policy having expired before the rendition of judgment, the appellants were entitled to one as in the nature of damages under the general relief sought, for the value of the fund accumulated on the 1st of October, 1875. (*Goodwin* v. *Mass. M. Life*, 73 N. Y. 487;

Door v. *Phœnix M. Life*, 67 Me. 438; *Phœnix M. Life* v. *Baker*, 85 Ill. 410; *Brooklyn Ins.* v. *Dutcher*, 95 U. S. 269; *Winchell* v. *Hancock M. Life* [U. S. Cir. Ct.], 8 Ins. L. J. 651.)

Henry W. Johnson for respondent. The policy with the conditions and agreement thereon indorsed were delivered together, and constitute but a single instrument, and the whole must be construed together. (*Worsley* v. *Wood*, 6 T. R. 710; *Mut. B. L. Ins. Co.* v. *Miller*, 2 Ins. L. J. 109; *Jennings* v. *Chenango Co. Mut. Ins. Co.*, 2 Den. 75; *Patch* v. *Phœnix M. L. Ins. Co.*, 44 Vt. 481; *Braunstein* v. *Accidental Death Ins. Co.*, 2 Bigelow, 610; Bliss on Life Insurance, § 58; *Evans* v. *U. S. Life Ins. Co.*, 3 Hun, 587; affirmed, 64 N.Y. 304; *Globe Mut. Life Ins. Co.* v. *Wolff*, 7 Ins. L. J. 44; *Rann* v. *Home Ins. Co.*, 59 N. Y. 388.)

EARL, J. On the first day of October, 1868, the defendant issued its policy of insurance commonly called an endowment policy, whereby for the consideration of $1,180.90, paid to it by the plaintiff, and of the annual premium of a like sum to be paid during the continuance of the policy, it insured the life of William M. Tweed, of the city of New York, in the sum of $10,000, for the benefit of the plaintiffs, share and share alike, payable three months after due notice and satisfactory proof of the death of Tweed during the continuance and before the termination of the policy, provided, however, that in case Tweed should be alive on the 3d day of April, 1878, and the policy should then be in force, the sum of $10,000 should be paid to him.

The policy contained numerous conditions, one of which declared that it should be "void, null and of no effect," if the party whose life was insured should, "without the written consent of this company, previously obtained, travel upon the seas except in voyages between coastwise ports of the United States"; and on the back of the policy there was also a stipulation or condition signed by the president and secretary of the company

in these words: "It being understood and agreed that if, after the receipt by this company of not less than three or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then upon the surrender of the same, the company will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for three years have been made, it will issue a policy for three-tenths of the sum originally insured; if for four years, for four-tenths; and in the same proportion for any number of payments, without subjecting assured to any subsequent charge except the interest annually on all premium notes remaining unpaid on this policy."

Immediately after the policy was issued Tweed assigned to the plaintiffs all his interest therein. The premiums were duly paid on the policy in each year after its date down to and including the premium due on the first day of October, 1875, but not thereafter. On the 4th day of September, 1875, Tweed escaped from the custody of the sheriff of the city and county of New York, who then held him under civil process of arrest, and was recaptured at Vigo, in the kingdom of Spain, during the last week in September, 1876, when, as a prisoner, he was brought to this country in a vessel of war belonging to the navy of the United States, and restored to the custody of the sheriff. He had never obtained the consent of the company to travel upon the seas, and such travel was without its previous knowledge or subsequent assent.

The plaintiffs did not surrender, or offer to surrender the policy, until after the first day of August, 1877, when they offered to surrender the same, and demanded from the defendant a paid-up policy for eight-tenths of the amount of the policy, which demand was refused.

The plaintiffs thereafter, in November, 1877, commenced this action to enforce specific performance of the agreement to issue and deliver a paid-up policy of the same tenor and effect as the original policy for the sum of $8,000, or that they should have judgment decreeing that the original policy be rescinded

and that they recover of the defendant all moneys paid upon that policy as premiums together with interest. The defendant defended the action upon the sole ground that Tweed had violated the policy prior to October, 1876, by his travel upon the seas, and whether this was a good defense is the sole question for our present determination.

The interest of the plaintiffs in the policy, independent of such interest as they acquired by the assignment executed to them by Tweed, was contingent upon his death before the 3d day of April, 1878, as it was only upon such a contingency that the amount insured was, by the terms of the policy, payable to them. Tweed was admitted to be alive at the commencement of the action and there was no proof of the date of his death or that in fact, he has since died. The trial of the action was commenced on the 12th day of March, 1878, and the decision therein was rendered July 1, 1878, after the plaintiffs, by the terms of the policy, if Tweed were then alive, ceased to have any interest therein. In the absence of proof, he must be assumed to have been then alive, and hence all the interest the plaintiffs could then have in the policy was such as they acquired by virtue of his assignment to them. Hence, any defense the defendant could have made to an action brought by Tweed upon the policy, it would seem could be made against the plaintiffs.

That the policy was forfeited and all rights under it gone by the express terms thereof would seem to be too plain for much argument. But the plaintiffs seek to escape from the forfeiture upon various grounds, elaborately and earnestly insisted on, which we must briefly consider.

It is provided in the body of the policy that any violation of the conditions there named, among which is the one against travel upon the seas without consent, shall avoid the policy. They are all conditions subsequent and the violation of any one of them, *ipso facto*, avoided the policy without any notice from the company.

The forfeiture of the policy was expressly stipulated, and we know of no principle of equity which would authorize any

court to relieve against such a forfeiture. There is certainly no authority in this State justifying such relief. Even if a court of equity would, in any case, grant relief against such a forfeiture, there are no circumstances here which, upon equitable principles, would sanction such relief. The forfeiture was not incurred by accident, ignorance, mistake or any overpowering necessity. It was incurred in the efforts of the assured to escape from the hands of the law.

It is not expressly provided in the policy that for the violation of the conditions here referred to the premiums paid should also be forfeited, but such is the necessary result. The premiums were paid upon the contract between the parties, and the plaintiffs had the benefit of the contract in the insurance upon the life of Tweed during the eight years, and so long as the defendant kept the contract on its part, they could not by themselves or Tweed violate the contract and thus terminate it, and then recover back any portion of what they had paid thereon toward its execution on their part. To allow such a recovery would be violative of principles applicable to all executory contracts. That premiums paid under such circumstances are forfeited has always been held in this State and, it is believed, everywhere.

It was also provided in the policy that if any of the statements made in the application for the insurance were untrue, or if any of the conditions printed on the back of the policy should be violated, the policy should become void, and all the premiums paid should be forfeited to the company. As we understand the argument of plaintiff's counsel, they claim because here the forfeiture of the premiums is expressly provided for, while there is no such provision as to the violation of the other conditions above named, it must be inferred that such a forfeiture as to such other conditions was not intended. Such an inference is unwarranted. An apparent purpose may be discovered for the insertion of this express stipulation. Some of the conditions to which it has relation were conditions precedent, for the violation of which the policy would be inoperative from its date. In such a case, when the company

assumed no responsibility and earned no part of the premiums paid, such a stipulation might be supposed to serve a purpose. The slender implication furnished by the insertion of this express stipulation is not sufficient to prevent the result to flow from the violation of the other conditions before mentioned in the policy which is usual, and, so far as has come to our observation, universal in all kinds of insurance.

It is also provided in the policy that the omission to pay the annual premium when due or the failure to pay at maturity any note (other than the annual premium note), given for premium, interest, or other obligation on the policy, should then and thereafter cause the policy to be void, "without notice to any party or parties interested therein." It is claimed on behalf of the plaintiffs that because it is here expressly provided that the policy should be void without notice, a forfeiture is not to follow the violation of other conditions contained in the policy in the absence of notice. The views above expressed are in part an answer to this claim. There is an apparent purpose for the insertion of this express stipulation. In making payments both parties must act, the one in receiving and the other in making the payments; and there are cases where one party is to make and the other to receive performance of a contract in which the latter must give some notice or make some demand in order to put the former in default; and this stipulation may have been inserted with the view to the rule in such cases. The object of a notice or demand in such cases is, to give the party, from whom performance of an obligation is required, an opportunity to perform. But as to the conditions subsequent contained in the body of this policy, a notice preceding forfeiture is wholly impracticable. What kind of a notice would be required, and what purpose could any notice serve, in case the assured should die by his own hand, or in consequence of a duel, or by the hand of justice, or in a drunken debauch, or if he should travel upon the seas without the previous knowledge of the insurer? The policy itself contains all the notice required, and for the

violation of these conditions it is sufficient for the insurer to make its defense when sued.

When the last premium was paid by the plaintiffs upon this policy Oct. 1, 1875, this receipt, signed by the president and secretary, was given:

"Policy No. 30,444, issued in favor of Josephine S. and Jennie S. Tweed, is hereby continued in force for twelve months from this date, to wit, until the first day of October, 1876, at noon, subject to and upon the express condition that if any note or other obligation given for any portion of the premium, due this day upon said policy, together with the interest on any loan, note or other obligation for premium thereon, shall not be paid on the day when the same shall become due and payable, then and from thenceforth said policy and this continuation thereof, shall immediately cease and become void, without notice to the insured or insurer, or any party or parties interested therein." The contention on the part of the plaintiffs is that this receipt kept the policy in force for one year, subject only to the conditions therein named. All of this receipt after the figures "1876" was in print and was undoubtedly the general form in use in the office of the defendant. There were doubtless cases to which the printed matter would be applicable, but it was not applicable to this case in which the premiums were all paid in cash, and it is clear that it was not inserted in this receipt for any purpose.

This receipt was intended as an acknowledgment that the premium for one year had been paid, and that so far as depended upon such payment the policy would be continued in force for one year. There is no reason to believe that it was intended that it should have any other or greater force. It cannot be supposed that the defendant meant to modify its policy or to annul the many important conditions therein contained so that the assured could commit suicide, or be hung for crime, or killed in war, or travel upon the seas, or engage in any of the extra-hazardous pursuits prohibited in the policy and yet a forfeiture not be produced.

On the back of the policy was printed the following.

"Written permits signed by the president or secretary of the company will be granted on reasonable terms for persons insured in this company to make voyages to any foreign country." The claim of the plaintiffs is that it was incumbent upon the defendant to grant a permit for travel upon the seas when demanded, upon the payment of a reasonable charge; that a forfeiture of the policy is not caused by a failure to obtain such a permit before the forbidden travel; but that the court at Special Term should have ascertained what a reasonable charge would have been, and allowed it to the defendant as a deduction from the amount otherwise due the plaintiffs. It is not provided that the permit will be granted upon the payment of a reasonable charge, but that it will be granted upon "reasonable terms." The defendant could not only make a reasonable charge for a permit, but could impose other terms, such as the time, mode and route of travel. If it unreasonably refused a permit, it is possible that a case might be made which would authorize a court of equity to compel the granting of one. But the terms upon which one is to be granted are so far in the discretion of the company that it would be a very rare and extraordinary case which would authorize any court to substitute its discretion for that of the company in regulating the terms of such a permit. But here the permit was not asked for; the voyage across the ocean was taken in violation of the condition in the policy, and the company was deprived of the opportunity to fix the terms upon which it would consent to the voyage. The assured chose his own time, route and mode of travel, and the policy became void by its express terms. There is nothing now for a court of equity to act upon; there are no terms to prescribe; and there is no power to relieve from the forfeiture, although the assured returned in safety to this country. (*Hathaway* v. *The State Mut. L. & Fire Ins. Co.*, 11 Cush. 448; *Nightingale* v. *The State Mut. L. Ins. Co. of Worcester*, 5 R. I. 38; *Rainsford* v. *The Royal Ins. Co., of Liverpool*, 33 N. Y. Sup. Ct. 454; affirmed 52 N. Y. 626; *Evans* v. *The U. S. L. Ins. Co.*, 64 id. 304.)

It is further contended on behalf of the plaintiffs that the

stipulation on the back of the policy, hereinbefore set out, providing for a paid-up policy, constituted a separate, independent or severable contract, and hence that the conditions contained in the body of the policy cannot be applied to it. There was but one contract between the parties, in which the defendant agreed, upon the payment of the premiums and performance of all the conditions by the plaintiffs and the assured, to pay the money as specified, and, in the event mentioned, to issue a paid-up policy. The whole contract is contained in the policy, and all that is printed or written on the face of it and on the back of it are parts of the policy and constitute the contract. (*Jennings* v. *The Chen. Co. M. Ins. Co.*, 2 Denio, 75; *Patch* v. *The Phœnix Mut. L. Ins. Co.*, 44 Vt. 481.) It is expressly mentioned in the body of the policy that the conditions printed on the back thereof are part thereof, and there are ten conditions, numbered consecutively, of which the one providing for a paid-up policy is the last one. That condition, by its terms, refers to what appears upon the face of the policy, and by its very language purports to be a part of the policy. That condtion was inserted in the policy to meet the case of those who, after the payment of three or more premiums, became unable or for some cause unwilling, to continue the payment of premiums, and for that reason permitted the policy to lapse. It was in one case only that a paid-up policy could be required, and that was in case the "policy should cease in consequence of the non-payment of premiums." The company did not agree to issue a paid-up policy if the policy ceased from any other cause. A party demanding such a policy must come to the company with a policy fully in force but for the non-payment of a premium. If it had been intended that a paid-up policy could be demanded whenever the policy, after the payment of three or more premiums, should cease from any cause, a matter of so much importance and so novel in insurance policies would have been plainly stated.

In reaching the conclusion that the policy was avoided by Tweed's travel upon the seas without the permit of the company, we have not been unmindful of the rule that contracts

are to be so construed, if by a proper interpretation of the language used they can be, as to avoid forfeitures. Here, considering all the language used, it is clear, we think, that it was intended that an absolute forfeiture should follow the breach of the condition against travel upon the seas.

It is a mistake to suppose that courts of equity will generally relieve against forfeitures. They will sometimes do so. Their jurisdiction to do so has been regarded as a dangerous one, not to be extended, and wise jurists have said that it should be sparingly exercised (Story's Eq. Jur., § 1301, et seq., and cases cited.) It has generally been found most conducive to the general welfare to leave parties to make their own contracts and then enforce them as made, unless on the grounds of fraud, accident, mistake, ignorance, impossibility or necessity, relief can be granted against them. When the damages caused by a breach of any condition can be easily and accurately ascertained and the award of damages will place the party entitled to claim a forfeiture in as good position as he was before the breach, courts of equity will sometimes relieve against the forfeiture. But in the case of insurance companies issuing thousands of policies containing carefully-framed conditions upon which many of their calculations are based, and upon which they rely for certainty, security and facility in the transaction of their business—business carried on in many States, at distant places, by means of numerous agents — it would lead to great embarrassments if such companies could be required to litigate with every policy holder who claimed to be relieved from a forfeiture, and to take such a measure of compensation as the courts should allow. By the exercise in such cases of the jurisdiction to relieve against forfeitures, courts might now and then give relief in cases of special hardship, but the general consequence of the exercise of the jurisdiction could not fail to be harmful.

We are therefore of opinion that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

Statement of case.

JEREMIAH VINCENT et al., Respondents, *v.* SYLVIA D. NEWHOUSE et al., Appellants.

The will of D. gave to his wife certain lands for life and directed that at her death the lands should be sold by the executor, and "the proceeds be equally divided between my daughters Sylvia, Harriet and Janetta, and the children and heirs of my sons Benjamin and Sumner and of my daughter Cynthia, share and share alike, and if either of the heirs above mentioned and intended shall die after the date of this will and before the said sums are paid them, the share of the one so dying without issue shall be equally divided among the other heirs above named." The testator died leaving his wife and the six children named surviving. Harriet and Janetta both died, leaving no children. Benjamin died, leaving a son and grandson, and Sumner died leaving seven children surviving. Afterward the widow died, and thereafter Cynthia died, without issue. In an action to obtain a construction of the will *held*, that the will intended a conversion of the land into money; the actual conversion, however, not to take place until the termination of the life estate; and by the provision the land was equitably converted into money from the time the sale was directed to be made that no portion of the remainder vested at the death of the testator but only upon the death of the widow; that Harriet and Janetta having died before that time, and Cynthia thereafter without issue, it left the proceeds to be divided between Sylvia, the children of Sumner, and the child and grandchild of Benjamin; such children and grandchild taking *per stirpes*, not *per capita*.

(Argued December 21, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made October 23, 1878, affirming a judgment entered upon the report of a referee.

The nature of the action and the facts appear sufficiently in the opinion.

James H. Stevens, Jr., for appellant Newhouse. The interests of the beneficiaries were contingent until the death of Mercy Dole. (*Moore* v. *Lyon*, 25 Wend. 119, 124; *Van Nostrand* v. *Moore*, 52 N. Y. 12; *Colton* v. *Fox*, 67 id. 352, 353; *Costar* v. *Lorillard*, 14 Wend. 298; *Carmichael* v. *Carmichael*, 1 Abb. Ct. App. Dec. 309; *Guernsey* v. *Guernsey*, 36

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N. Y. 267; *Tyrun* v. *Blasel*, 22 id. 558; *Teed* v. *Morton*, 60 id. 502; *Moncrief* v. *Ross*, 50 id. 431.) Future estates are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain. (*Moore* v. *Little*, 41 N. Y. 77.) Upon the death of the life-tenant the one hundred and sixty-nine acres became vested as personal property in the survivors of Harriet and Janetta. (*Cushman* v. *Houton*, 59 N. Y. 152; *Smith* v. *Scholts*, 68 id. 59; *Kiah* v. *Grenier*, 56 id. 220; *Bundy* v. *Bundy*, 38 id. 410, 419; *Norris* v. *Burger*, 3 Kern. 280; *Baker* v. *Lener*, 67 N. Y. 308.)

C. N. Flenagin for appellants Dole and others. Upon the death of the life-tenant, the legacy vested in the surviving beneficiaries. (*Cripps* v. *Wolcott*, 4 Madd. 15; Williams on Executors [6th Am. ed.], 1575, note; *Sinton* v. *Boyd*, 19 Ohio St. 30; 2 American R. 369; *Hatch* v. *Bassett*, 52 N. Y. 359; *Leed* v. *Morton*, 60 id. 502–507; 2 Jarm. on Wills, 641; 1 id. 525–530; *Moncrief* v. *Ross*, 50 N. Y. 431; *Stagg* v. *Jackson*, 1 Comst. 206; *Ross* v. *Roberts*, 2 Hun, 90; 4 Hill, 292; 17 Eng. [Moak's Notes] 729; *Colton* v. *Fox*, 67 N. Y. 348; 2 Williams on Executors [6th Am. ed.], 1334; *Carmichael* v. *Carmichael*, 43 N. Y. 346; *Egerton's Adm's* v. *Conklin*, 25 Wend. 241; 2 Washburn on Real Estate [3d ed.], 511; *Matteson* v. *Wheeler*, 11 Hun, 245; *Adams* v. *Beekman*, 1 Paige, 633; *Everett* v. *Everett*, 29 N. Y. 75; *Gillman* v. *Reddington*, 24 id. 502; *Howell* v. *Mills*, 7 Lans. 193.) The words "share and share alike," and "equally to be divided," occurring in the second clause of the will, clearly indicate that the testator intended that the division of the proceeds of the sale of the one hundred and sixty-nine acres among the surviving beneficiaries should be made *per capita*. (*Macknet* v. *Macknet*, 9 C. E. Green, 293; *Lee* v. *Lee*, 16 Abb. Pr. 127; *Myers* v. *Myers*, 23 How. 410; *Clark* v. *Lynch*, 46 Barb. 68; *Seabury* v. *Brewer*, 53 id. 662; *Bunner* v. *Storm*, 1 Sandf. Ch. 358; *Murphy* v. *Harvey*, 4 Edw. Ch. 131; *Hill* v. *Spruell*, 4 Ired. [N. C.] Eq. 244; *Cheeves* v. *Bell*, 1 Jones [N. C.], Eq. 234; *Shuell* v. *Johnson*, 2 id. 202; *Patterson* v. *McMasters*, 3 id.

208; *Ballard* v. *Connors*, 10 Rich. [S. C.] Eq. 389; *Lane* v. *Lane*, 1 Wins. [N. C.] Eq. No. 284; *Smith* v. *Ashhurst*, 34 Ala. 208; *Bender's Appeal*, 3 Grant's [Pa.] Cas. 210; *Wessenger* v. *Hunt*, 9 Rich. [S. C.] Eq. 459; *Burnett* v. *Burnett*, 30 N. J. Eq. 595; 23 Eng. R. [Moak's Notes] 513; *Dowding* v. *Smith*, 3 Beav. 541; 2 Williams on Executors [6th Am. ed.], 1624; 9 Paige's Ch. 81; 2 Pere Williams, 383; 10 Simons, 626; 2 Hare, 54; 1 Bradford, 314; *Payne* v. *Webb*, 11 Eng. R. [Moak's Notes] 647.)

L. W. Thayer for respondents. The relations of the testator to the objects of his bounty, and also the mode in which the law would dispose of the property in case of intestacy, will be taken into the account in interpreting wills. (*Clark* v. *Lynch*, 46 Barb. 81.) When the word heirs is used in a will, and there are no other words to control the presumption, the legal inference is that it is *nomen collectivum;* that it designates the persons whom the law appoints to succeed to the inheritance in case of intestacy, and that legatees thus designated take by representation and not in their own right. (*Daggett* v. *Stock*, 8 Metc. 453; *Blakelee* v. *Webb*, 2 Pere Wm.'s Rep. 383; *Bool* v. *Mix*, 17 Wend. 119; *Hoppock* v. *Tucker*, 1 Hun, 132; 59 N. Y. 202.) The remainder vested in interest in the three daughters named, absolutely upon the death of the testator, and also in the three classes mentioned, and in being subject to the limitation over, to open and let in children born after his death and before the death of the widow. (*Doe* v. *Provoost*, 4 Johns. 64; *Morris* v. *Lyons*, 25 Wend. 44; *Manice* v. *Manice*, 33 N. Y. 367; *Traver* v. *Schell*, 20 id. 89; *Everett* v. *Everett*, 29 id. 39; *McKinsley* v. *Saunders*, 2 N. Y. Sup. Ct. Rep. 81; *Lawrence* v. *Bayard*, 7 Paige, 75; *Moore* v. *Littel*, 41 N. Y. 80; *Mead* v. *Mitchell*, 17 id. 11; 2 R. S. 132 [4th ed.], § 13.)

DANFORTH, J. By the second clause of the will of Thomas Dole he declared as follows: "I give and devise to my wife Mercy, during her life, * * * one hundred and

sixty-nine acres of land, * * * and I do order and direct that at the death of my said wife the said one hundred and sixty-nine acres of land be sold by my executor, and the proceeds be equally divided between my daughters Sylvia, Harriet and Janetta, and the children and heirs of my sons Benjamin and Sumner, and of my daughter Cynthia, share and share alike, and if either of the heirs above mentioned and intended shall die after the date of this will, and before the said sums are paid, then the shares of the one so dying without issue shall be equally divided among the other heirs above named," and by a subsequent or fifteenth clause as follows: "I give, bequeath, and devise all the rest and residue of my property, real and personal, to my wife Mercy, my daughters Sylvia, Harriet and Janetta, and the children of my two sons Benjamin and Sumner, to be equally divided among them, share and share alike, except my mill property on lot ten (10), one-third of which I give to my wife Mercy, and I do order and direct my executor to sell my property on number ten (10) and divide two-thirds of the proceeds among the heirs last mentioned." Moses Smith was appointed executor of the will. The testator died April 4th, 1842, and left surviving, his wife Mercy, and the six children named in the second clause of the will; afterward died Smith, the executor. Harriet became the wife of the plaintiff, and Janetta, the wife of J. Monroe Smith; but both died, leaving no issue. Benjamin died, having two children; and Sumner died, having seven children, all of whom survived him. After them, and on the 14th of November, 1873, the widow, Mercy, died; after her, and before the commencement of this action, Cynthia died, without issue. Harriet devised her interest in the estate to her husband. Janetta died intestate, but left surviving her husband, who is one of the defendants but not an appellant herein. Benjamin, at his death, left a son and grand-daughter, his heirs. They were living at the time of the death of Mercy, and the plaintiff, Jeremiah Vincent, before that time, and on the 11th of November, 1870, acquired by purchase their rights to the lands and interests involved in

this action. He also purchased the rights and interests of Cynthia. The action was brought to obtain, among other things, a determination of the rights and interests of all the parties under the will, the appointment of a trustee, who, in place of Smith, the executor, should execute its provisions concerning the sale of the premises mentioned in the second clause above set out, and divide the proceeds between the parties interested therein. After answer, a referee was appointed to hear and determine the issues raised thereby. To his report exceptions were taken, and these having been held invalid by the Supreme Court, are made the basis of this appeal. The learned referee, as to the remainder provided for in the second clause of the will, held, first: "That the testator converted it into personal property, and that the beneficiaries took their respective interests as legacies or money, the proceeds of the sale of the lands;" second: "That such proceeds should be divided into six equal portions, and that each of the daughters, Sylvia, Harriet and Janetta, were they living, would be entitled to a portion of one-sixth, and the children of Sumner Dole, as a class, would be entitled to one-sixth, and the children of Benjamin Dole, as a class, to one-sixth." Third: "That these five portions became vested in interest respectively, upon the death of the testator," subject to contingencies not now important. Fourth: "That as Cynthia had no children and is now deceased, there has been a failure of the expectations and intentions of the testator as to her one-sixth, and it has gone into the residue," under the residuary clause (15) above set forth. Fifth: "That the lands mentioned in said second clause" (the one hundred and sixty-nine acres) "must be sold and the proceeds divided as follows: To J. Monroe Smith, the surviving husband of Janetta, one-sixth; to the plaintiff, Jeremiah, as legatee and devisee of his wife Harriet, one-sixth, and as grantee of Cynthia, one-sixth, and as grantee of the heirs of Benjamin Dole, one-sixth; to the children of Sumner Dole, as a class, one sixth, the share of each child being one-seventh of one-sixth; to Sylvia D. Newhouse, one-sixth." Seventh: "The

one-sixth" (Cynthia's share), "that has gone into the residue be also divided in six shares or portions."

In support of exceptions taken to these conclusions of the referee, the appellants claim, *first*, that the referee erred in the disposition directed by him of the one-sixth part designated as Cynthia's. And this seems to be so; for, as we have seen, he first holds that the plaintiff is entitled to it as the grantee of Cynthia, and again holds that it has "gone into the residue and is to be divided into six shares or portions," and the manner of distribution is given. It is obvious that both directions cannot stand, for either one would necessarily defeat the other. If the plaintiff takes the share as grantee of Cynthia, no part of it could go to the residue. And, on the other hand, if the share is regarded as part of the residue of the estate, it could not pass to the plaintiff as the grantee of Cynthia. This would require a modification of the judgment; but other difficulties are in the way of sustaining it. The bequest was not to Cynthia, but to her children. She died without issue, and had no interest. The plaintiff therefore gained nothing from her grant. Nor should it go to the residue. The testator provides for such portion of the proceeds of the one hundred and sixty-nine acres, by declaring that it shall be equally divided among the other heirs named. It is also insisted that the rights of the beneficiaries under the second clause of the will are to be determined by the condition of relationship existing at the death of Mercy Dole, the life tenant; and one class of the appellants claim that Harriet and Janetta, having died without issue before the death of Mercy, the widow, and there being no children of Cynthia, that the shares which they would otherwise have had are to be equally divided among the survivors *per capita* and not *per stirpes*; so that there should be ten parts to be distributed, as follows: One-tenth to Sylvia D. Newhouse; one-tenth to each of the seven children, or representatives of the children of Sumner Dole; and one-tenth to each of the two children or representatives of the children of Benjamin Dole. The other appellant, Sylvia D. Newhouse, while alleging error in other

respects, claims to be entitled to a share of one-sixth, according to the referee's report.

Upon the principal question involved — the one as to which both classes of appellants agree — we think their contention is well founded. The testator empowers and directs the executor to sell the land and divide the proceeds. There is then intended a conversion of land into money, and it is this money which the beneficiaries are to have. The actual conversion, however, is not to take place until or at the death of the widow or life tenant; and we may say here, as was said by the Master of the Rolls in *Hoghton* v. *Whitgreave* (1 Jac. & Walker Ch. Rep. 145): "Not only was there no bequest before the widow's death, but the subject-matter did not then exist in the shape and form in which it is given." The meaning of the provision is the same as it would have been, if after naming the children and the grandchildren, the testator had simply added, and "the survivor or survivors of them." This would not mean those who survive the testator. It is not as if he said, "those who survive me;" for the gift relates to the death of his wife, and this is made plain by the express declaration, that "if either of the heirs before mentioned and intended shall die after the date of the will, and before the said sums are paid, then the shares of the one so dying without issue shall be equally divided among the other heirs above named." The question then is, who were capable of taking at the period fixed for distribution? This agrees with the rule of construction adopted by this court in *Teed* v. *Morton* (60 N. Y. 502), viz., that words of survivorship in bequests of personal estate are to be referred to the period of distribution and enjoyment, unless there is a special intent to the contrary. Such intent does not appear here, but from the language above quoted it is apparent that the purpose of the testator will be attained by the application of the doctrine formulated by this rule. There would be much force in the argument of the learned counsel for the respondent, if it were not for the fact that the testator has directed the executor to sell the land and specified the time of doing it — the death of the life tenant. He is vested with no discretion, and there is there-

fore no time during which the heirs would be entitled either to the possession of the land or to its rents and profits; for by the provision the land was equitably converted into money from the time the sale was directed to be made. (*Moncrief* v. *Ross*, 50 N. Y. 431; *Hatch* v. *Bassett*, 52 id. 359.) We think, therefore, that the learned referee erred in holding that any portion of the remainder provided for in the second clause of the will vested at the death of the testator, and that the exception thereto is well taken.

Another exception makes it necessary to determine the rule of distribution; and here it should be observed, that the explicit language of the testator gives the share of those dying "without issue after the date of the will, and before the sums are paid," to the other heirs mentioned or intended by him. This excludes Harriet, from whom, as her devisee, the plaintiff claims, and Janetta, from whom, in like manner, J. Monroe Smith claims. It excludes Cynthia, for the devise was not to her, but to her children, and she had none; and leaves the proceeds of the one hundred and sixty-nine acres to be divided between Sylvia D. Newhouse, the children of Sumner Dole, and the child and grandchild of Benjamin Dole. The children of Sumner Dole are appellants. In behalf of the children of Benjamin it is claimed, that they take *per capita* and not *per stirpes*. The referee held otherwise, and in this we concur with him. Such a construction carries out the apparent intention of the testator. He seems to have aimed at equality. The proceeds are to be "equally divided," "between," he says, "my daughters Sylvia, Janetta and Harriet, and the children and heirs of my sons Benjamin and Sumner, and of my daughter Cynthia; thus giving to each group of grandchildren a share equal to that given to a child. (*Bool* v. *Mix*, 17 Wend. 119.) I think this intent is manifested by the particular provision in the will under which the distribution is to take place. The beneficiaries are in the testator's mind not as individuals, but as a body or class, together representing or standing for his own child, and so together taking of his bounty a share equal to that given to his own child—his own child-

ren, in equal shares *in capita*, his grandchildren, by representation *in stirpes*. There is nothing in the will to indicate a different purpose, and it accords with the general scheme as manifested by other provisions of the will. At the beginning of that instrument, he declared his desire "to discharge the duties which every man owes to his family," by making such provision for the distribution of his "property as shall be just and equitable." A distribution which should give to the children of Sumner seven times more than was given to either one of the testator's own children would defeat the object expressed in this introduction. That he had sufficient or some reason for passing by his own son and bestowing his bounty upon the children of the son, may be assumed; but no intention is apparent to increase the bounty given to the issue of one son beyond that given to the other children. Our conclusion is confirmed when we find that by a subsequent provision, he gives to Sylvia, in fee, 239 acres; to Harriet, in fee, 225 acres; to Janetta, 173 acres; while "to the children and heirs of Benjamin, as tenants in common, he gives 215 acres in fee, and to the children of Sumner, as tenants in common, 162 acres, in fee; and preserves a like discrimination between the children and grandchildren in gifts of chattels made by subsequent provisions of the will. It is manifest that throughout the instrument he refers to the children of each son as a class together representing the son, and not as individuals. It may be conceded, that under a devise or bequest to one and the children of another, it has been often held, that *prima facie* the persons take *per capita* and not *per stirpes;* and to this effect are many cases cited by the appellant. But the rule is technical, is subject to many exceptions, and courts readily depart from it when a different intent is discoverable. (2 Jarm. on Wills, 107; *Balcom* v. *Haynes*, 96 Mass. [14 Allen], 204; *Lockhart* v. *Lockhart*, 3 Jones Eq. [N. C.] 205; *Fisher* v. *Skillman's Ex'rs*, 3 C. E. Green, 229; *Clark* v. *Lynch*, 46 Barb. 81; *Hoppock* v. *Tucker*, 59 N. Y. 202; *Ferrer* v. *Pyne*, 81 N. Y. 281.) We are thus led to the conclusion that the proceeds of the 269 acres should be divided into three parts, to one of which Sylvia

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D. Newhouse will be entitled; and as the plaintiff, Jeremiah Vincent, has by purchase acquired the rights of the children of Benjamin Dole, he will be entitled to one part, and the children and heirs of Sumner to one part. The judgment should be modified accordingly, without costs to either party as against the other upon this appeal.

All concur.

Judgment accordingly.

MARIA B. MINICK, Respondent, *v.* THE CITY OF TROY, Appellant.

The charter of the city of Troy (§ 10, chap. 129, Laws of 1872) provides that no civil action shall be brought against the city for injuries to person or property "unless it appears that the claim for which the action was brought was presented to the comptroller with an abstract of the facts out of which the cause of action arose, * * * and that the comptroller did not, within sixty days, audit the same." Plaintiff presented a petition, as required, setting forth the facts and claiming damages to the amount of $10,000 for injuries alleged to have been caused by the negligent omission of the city to keep one of its streets in repair. The claim not having been audited as prescribed, this action was brought. The complaint alleged, substantially, the same facts as the petition and claimed $5,000 damages. *Held*, that the word "claim," and the phrase "cause of action," related to the same thing; that although the amount of compensation was different, the claim presented in the petition and the cause of action set forth in the complaint were identical; and that there was a sufficient compliance with the provisions of the charter.

At the close of the charge of the court on the trial, defendant's counsel excepted to the court's "statement to the jury of the evidence or the supposed evidence connected with the accident," on the ground that it was "stated too strongly." *Held*, that the exception was not sufficient to bring up any question for review.

The injury was caused by the wheel of the wagon in which plaintiff was riding running into a hole in the street. The court after it had charged, in substance, that plaintiff could not recover if her negligence had in any manner contributed to the injury, and that she was responsible for the conduct of the driver, her son, was asked by defendant's counsel to charge that "if the hole was one which might have been seen by the plaintiff or her son and readily avoided by the ordinary exercise of their

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eyes, the failure to avoid it constituted negligence." The court replied that this was substantially correct, save the expression "might have been seen," as to which he charged, in substance, that if, in the use of ordinary care, the hole ought to have been discovered, plaintiff could not recover. *Held*, no error.

(Argued December 22, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made November 26, 1874, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 19 Hun, 253.)

This action was brought to recover damages for injuries alleged to have been received through the negligent omission of defendant to keep one of its streets in repair.

Plaintiff's evidence was to the effect that at the time of the accident she was riding in a wagon through Congress street, in the city of Troy; her son, a lad eighteen years old, was driving; one of the wheels of the wagon ran into a hole in the street, about a foot deep; the seat upon which plaintiff was sitting broke and she was thrown out and injured.

The further material facts are sufficiently stated in the opinion.

R. A. Parmenter for appellant.

Esek Cowen for respondent. Defendant was liable for any damages arising from its streets being out of repair. (*Davenport* v. *Ruckman*, 37 N. Y. 568; *Hutson* v. *The Mayor, etc.*, 9 id. 163; *Conrad* v. *Trustees of Ithaca*, 16 id. 158; *Weet* v. *Brockport*, id. 161.) The length of time the hole had existed raises the presumption of knowledge of its existence in the city authorities, and the omission to repair it was negligence on the part of the city. (*Requa* v. *City of Rochester*, 45 N. Y. 129.) The mere fact, that the damages were placed at different sums in the claims presented to the comptroller and in the suit, did not make the claim for compensation in any respect different. (*Field* v. *Field*, 77 N. Y. 294–297.)

Opinion of the Court, per DANFORTH, J.

DANFORTH, J. The plaintiff brought this action to recover damages for personal injuries sustained by her in consequence, as she alleged, of a defect in one of the defendant's streets. It was therefore necessary for her to show, in the first instance, "that the claim for which the action was brought was presented to the comptroller, with an abstract of the facts" out of which it arose, and that he did not within sixty days thereafter audit the same. *Charter of the City of Troy*, T. C., § 10. At the commencement of the trial she put in evidence a petition addressed by her to the mayor and commonalty of the city of Troy and to its comptroller, stating the facts of her case substantially as they are set out in the complaint, and her claim "for damages and injuries" arising therefrom at the sum of $10,000. It was not audited. In the action she demands judgment for $5,000, and upon this variance the defendant objects that the provision of the statute, *supra*, has not been complied with. The objection is, I think, not well taken.

It is obvious that the word "claim," and the phrase "cause of action," relate to the same thing and have one meaning. The plaintiff before suit had a "claim" for damages; and this, when stated in a complaint, is technically "a cause of action." The amount of compensation to which she conceived herself entitled, would not before suit, in any manner, vary or affect the claim; nor does its statement in the pleadings determine the relief to which she would be entitled. In both cases it depends upon the facts stated. The claim, or cause of action, is made out when the facts constituting it are established; and, as alleged in the complaint, they were the same as theretofore set forth in the petition. We think the statement was sufficient and the object of the statute answered. To the same effect in principle is the decision in *Field* v. *Field* (77 N. Y. 294).

At the close of the charge the defendant's counsel excepted to the court's "statement to the jury of the evidence, or the supposed evidence, connected with the accident," upon the ground that it was "stated too strongly." This was in general terms, and the attention of the learned judge was not called to any specific statement nor was he asked to charge in regard to

any other matter. In what way or to what extent it should be mitigated, was not suggested. The exception is not sufficient to bring before us any question for review.

Upon the subject of contributory negligence on the part of the plaintiff, the court charged: "The rule of law is, that the party who brings her suit must come into court with clean hands; she can only recover when the accident is solely caused by the negligence of the defendant. If the plaintiff's negligence contributes in any degree, then the defendant is not responsible." The duty of attention and observance on the part of the plaintiff and the driver, for whose conduct she was declared responsible, was there enforced. The defendant's counsel requested the court to charge "that if the jury shall find from the evidence that the hole in the street did exist, as stated by some of the plaintiff's witnesses, and that the wheel of the wagon got into it, and caused the seat to break, and the plaintiff to fall from the wagon, still if such hole was one which might have been seen by the plaintiff, or her son, the driver, and readily avoided by the ordinary exercise of their eyes, the failure to avoid it constituted negligence on the part of the plaintiff, which will defeat this action;" and the court replied: "That is substantially accurate. There is a single expression there, though, which needs to be modified, and that is, 'if this might have been seen.' That is the only part in the request to charge which is unsound. I charge you that if in the use of ordinary care and ordinary prudence, such as the ordinarily prudent person would have used under the same circumstances, it ought to have been discovered, then the plaintiff cannot recover." The defendant's counsel thereupon excepted to the refusal to charge as requested and to the charge as given. The exception is now insisted upon; but no ground of error is stated, and we can discover none. The plaintiff, for the purposes of the action, was taken to be in the same position as the driver, and in regard to contributory negligence, identified with him; so that his negligence, if there was any, was imputed to her; and then it was held in substance that if, by the exercise of ordinary care, he could have avoided the consequences of the defendant's negli-

gence, the plaintiff could not recover. The duty and obligation of the defendant to care for and maintain its streets had been adverted to in a manner satisfactory to its counsel, and by the various portions of the charge the case was fully presented. Negligence by the defendant, and ordinary care by the plaintiff, were necessary to sustain the action; or, as applicable to the facts of this case, a defect in the road, by the fault of the defendant and no want of ordinary care by the plaintiff. Such is the rule of law. It was fairly laid before the jury, and by their verdict the plaintiff's case is brought within it.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MARVIN R. CLARK, as Marshal, etc., Appellant, *v.* ALBERT G. WOODRUFF et al., Respondents.

In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words where they are in conflict and tend to different results.

Where a bond of indemnity given to an officer can reasonably be construed otherwise, a construction will not be given to it which will make the obligors liable for trespasses which they did not direct or authorize.

Defendants obtained judgment against W. and issued execution thereon to plaintiff as marshal, who levied upon personal property to about double the amount of the execution. This property was claimed by D. & H. Defendants gave a bond of indemnity, a printed form being used; it contained a written recital of the levy and the claim of D. & H., and a printed condition to save plaintiff harmless from levying and selling under his execution "any personal property which he or they shall or may judge to belong to the judgment debtor." A portion of the property levied on which was not in fact the property of W. was taken from plaintiff's possession by some person unknown; upon his reporting the eloignment to the defendants they notified him that they should hold him responsible for the levy. Plaintiff thereafter, without the authority, knowledge or consent of defendants, levied upon and sold other property, the proceeds of which he paid to defendants who received it without any knowledge of such new levy. An action was brought by S. against plaintiff for such levy and sale and judgment recovered against him. In

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an action upon the bond, *held*, that it was intended simply to furnish indemnity for the levies already made; that its terms did not enlarge plaintiff's authority, and the subsequent unlawful levy and sale was made entirely at his risk, and that defendants were not liable.

Also *held*, that the receipt by the defendants of the proceeds of the sale in ignorance of the facts was not a ratification; and that they were not affected by knowledge upon the part of their attorney, as he had no authority to bind them by directing a trespass or by ratifying one when committed.

Newberry v. *Lee* (3 Hill, 523), *Armstrong* v. *Dubois* (1 Abb. Ct. App. 11), *Stewart* v. *Wells* (6 Barb. 79), *Barker* v. *Braham* (3 Wils. 396), *Bates* v. *Pilling* (6 B. & C. 38), and *Brown* v. *Feeter* (7 Wend. 301), distinguished.

(Argued December 22, 1880; decided January 18, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made September 1st, 1879, affirming a judgment in favor of defendants entered upon the report of the referee. (Reported below, 18 Hun. 417.)

This action was brought by plaintiff upon a bond of indemnity executed by the defendants to the plaintiff, as marshal, which bond is as follows:

"Know all men by these presents, that we, Albert G. Woodruff, Francis J. Morris and Charles Morgan, are held and firmly bound unto Marvin R. Clark in the sum of one thousand dollars, lawful money of the United States, to be paid to the said Clark, or to his certain attorney or attorneys, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 16th day of March, in the year one thousand eight hundred and seventy-five.

Whereas, the above bounden Woodruff, Morris and Morgan did obtain judgment in the Marine Court against H. W. Webber, whereupon execution has been issued, directed and delivered to the said Clark, requiring him, out of the personal property of the said judgment debtor, to satisfy the judgment aforesaid;

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And whereas, certain personal property that appears to belong to the said Webber is claimed by one Dickson, and also one Hunt;

Now, therefore, the condition of the above obligation is such, that if the above bounden Woodruff, Morris and Morgan shall well and truly save, keep and bear harmless, and indemnify the said Clark, and all and every person and persons aiding and assisting him in the premises, of and from all harm, let, trouble, damage, liability, costs, counsel fees, expenses, suits, actions, judgments, special proceedings and executions, that shall or may at any time arise, come, accrue, happen or be brought against him, them or any of them, as well for the levying and making sale under and by virtue of such execution, of all or any personal property, which he or they shall or may judge to belong to the said judgment debtor, as well as in entering any shop, store, building, or other premises, for the taking of any such personal property, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

WOODRUFF, MORRIS & CO. [L. S.]
FRANCIS I. MORRIS. [L. S.]"

A printed form was used for the bond; the recitals were written therein; the facts and circumstances under which the bond was given are set forth in the opinion.

Edward P. Wilder for appellant. To alter a contract on the ground of mistake it must be shown that both parties to it understood it as it was alleged it ought to have been. (*Lyman* v. *Utica Ins. Co.*, 17 Johns. 373; *Nevins* v. *Dunlap*, 33 N. Y. 676, 680; *Jackson* v. *Andrews*, 59 id. 244; *Boardman* v. *Davidson*, 7 Abb. [N. S.] 439; *Pennell* v. *Wilson*, 2 id. 466; *Botsford* v. *McLean*, 42 Barb. 445; *Dambman* v. *Schulting*, 7 N. Y. Weekly Dig. 570–1; *Miaghan* v. *Hartford Fire Ins. Co.*, 12 Hun, 321; *Moran* v. *McLarty*, 11 id. 66; *Wheaton* v. *Fay*, 62 N. Y. 275; *Armstrong* v. *Dubois*, 1 Abb. Ct. App. 11.) Plaintiff's acts were directed or ratified by defendants after giving him the bond. (*Stewart* v. *Wells*, 6 Barb. 79;

Newberry v. *Lee*, 3 Hill, 523; *Barker* v. *Braham*, 2 Wils. 396; *Bates* v. *Pilling*, 6 Barn. & C. 38; *Brown* v. *Feeter*, 7 Wend. 301.)

John Brooks Leavitt and *L. B. Bunnell* for respondents. By the bond of indemnity defendants did not authorize nor indemnify against the Harlem levy. (*Griffin* v. *Hardenburg*, 41 N. Y. 464; *Blossom* v. *Griffin*, 13 id. 569.) An excessive levy is a trespass, for which the execution debtor may sue the officer. His writ is no protection to him, for he does not levy by virtue of it, as it only commands him to levy upon sufficient to satisfy it. (*Hoyt* v. *Hudson*, 12 Johns. 206; *Ladd* v. *Blunt*, 12 Mass. 403; *McChain* v. *Duffy*, 2 Duer, 647; *Green* v. *Brook*, 23 Wend. 490; *Ostrander* v. *Wilder*, 2 Hill, 329; *Dempsey* v. *Fox*, 22 Barb. 522; *Merriweather* v. *Nixon*, 8 Term R. 186; *Peck* v. *Ellis*, 2 Johns. Ch. 137; *Coventry* v. *Barton*, 17 Johns. 142; *Holman* v. *Johnson*, Cowp. 341; *Griffin* v. *Hardenburg*, 41 N. Y. 464; *People* v. *Mayor*, 19 How. 293; 2 Cowen's Treatise, 538; Crocker on Sheriffs [2d ed.], Forms Nos. 174, 177, p. 564; *Curtis* v. *Patterson*, 8 Cow. 65; *Sullivan* v. *Anderson*, 19 Johns. 233.) The written part of the bond is to prevail over the printed part. (*Hill* v. *Miller*, 76 N. Y. 32.) What the attorney in this case knew and did would not make defendants liable to Sarah Hunt. (*Welsh* v. *Cochrane*, 63 N. Y. 181, 185; *Averill* v. *Williams*, 1 Den. 501; *S. C.*, 4 id. 295; *Olstreck* v. *Gilbert*, 9 Hun, 242.) There was no ratification. (*Wilson* v. *Tumman*, 6 M. & G. 240; *Hyde* v. *Cooper*, 26 Vt. 526; *Adams* v. *Freeman*, 9 Johns. 117.) The indorsement of a debtor's address upon an execution is no direction whatever to execute the writ against any person or property, but simply information to the officer where to find defendant. (Addison on Torts, § 1187; *Children* v. *Wooler*, 29 L. J. [Q. B.] 129; *Cronshaw* v. *Chapman*, 7 H. & N. 911; *Yale* v. *Dederer*, 68 N. Y. 333.)

FINCH, J. The condition of the bond given to the marshal is differently construed by the opposite parties. The officer

relies upon its express language and literal terms, and insists that its protection for a levy upon or sale of any property which he "shall or may judge to belong to the said judgment debtor," covered all his acts previous to the execution of the bond, and his levy made thereafter upon the goods in the Third avenue store. Assuming, as the referee has found, that this last levy was made without the knowledge or authority of the defendants, the interpretation of the marshal is that he had the right to make any further levy he pleased upon the basis of his own sole judgment, and the bond would cover the consequences. The construction asserted by the defendants is that the bond was an indemnity to the officer only as against the levies already made, or such others as the defendants should specifically authorize and request, and they reach this construction not by contradicting or modifying the written language of the instrument, but by interpreting that language in the light of the surrounding circumstances, and so ascertaining its actual and real meaning. The written recital in the bond and the printed clause in the condition point in different directions. The one plainly refers to levies already made, and the known adverse claims to the property of "one Dickson" and "one Hunt" and so indicates an understood intention on both sides to indemnify the officer against the consequences of levies already made, and the claims of known and expected adversaries. The printed condition has a much broader scope, and indicates an intention to protect the officer in making any future levies upon property "which he may judge" belongs to the debtor in the execution. This ambiguity it was proper to solve by throwing upon the language used the light of surrounding circumstances. That is a rule of interpretation merely, and does not permit the making of a new contract, or a reformation of it, or a disregard of its terms. It authorizes only a just construction of those terms and a fair inference as to the common understanding of both the contracting parties. (*Blossom* v. *Griffin*, 13 N. Y. 569; *Griffiths* v. *Hardenberg*, 41 id. 468; *Thomas* v. *Truscott*, 53 Barb. 200; *Liddle* v. *Market Fire Ins. Co.*, 4 Bosw. 179.) Resort may also be had to the further rule that in the inter-

pretation of the language of an instrument, greater weight should be given to the written than to the printed words, where they lead different ways, and tend to contrary results. (*Hill* v. *Miller*, 76 N. Y. 32; *Harper* v. *The Albany Mutual Ins. Co.*, 17 id. 194; *Benedict* v. *Ocean Ins. Co.*, 31 id. 397.) The language of printed blanks is easily assumed to be appropriate, without careful examination, while the written words more safely and more nearly indicate the intention of the contracting parties. Founded upon these two rules, the defendant's interpretation prevailed before the referee and received the approval of the General Term. In reviewing their conclusion, as to some extent involving a question of law, we must assume the facts as found by the referee so far as they are founded upon some evidence tending to the conclusion reached.

The general facts are these: That the defendants, having obtained a judgment against one Webber, caused an execution against his property to be issued to the marshal, and indorsed thereon for the latter's information three addresses of the debtor, viz., one on Sixth avenue, one on Broadway, and one on Third avenue; that the defendants' judgment was for $289, and the marshal, by virtue of his execution, on the 2d day of March, 1875, levied upon the goods in the Sixth avenue and Broadway stores, and which were estimated to be worth $700, and, therefore, amply sufficient to satisfy the execution; that the goods in the Sixth avenue store were, soon after the levy, claimed by one Dixon as owner, and those in the Broadway store by Barbara Ann Hunt; that the marshal notified the defendants of his two levies, and of the hostile claims, and required an indemnity, whereupon the bond in question was executed; that it was so executed and delivered on the 16th day of March, 1875, and its tenor and effect were well known to the marshal, but it was understood by the defendants to protect the marshal for acts done by him thereafter, under their authority; that the property in the Sixth avenue store was, on the night of the 16th of March, eloigned and taken from the marshal's possession by some person unknown, but the property so eloigned was not in fact the property of Webber; that, upon the marshal's re-

porting to the defendants the eloignment of the property in the Sixth avenue store, they notified him that they should hold him responsible for his levy; that the marshal thereafter, without the authority, knowledge or consent of the defendants, and on the 29th of March, levied upon and afterward sold the goods in the Third avenue store; that he paid over the proceeds of such sale to the defendants, but the latter received the same without any knowledge of the levy or sale at the Third avenue store; that on the 25th of March, the marshal was sued for such levy and sale by one Sarah P. Hunt, who recovered a judgment against him of $519.95 damages and costs. On this state of facts the referee held that the bond did not protect the marshal in his last levy and sale; that the terms of the instrument did not enlarge his authority in respect to his duty; that no levy having been made on the property in the Third avenue store when the bond was given, it must be presumed that it was not the intention of the parties to give or require indemnity for such last levy and sale; that having been made without defendant's knowledge or authority, the proceedings were wholly at the marshal's risk, and the defendants were not liable on their bond. It seems very apparent, when we study the situation, that, at the date of the delivery of the bond, neither party contemplated any further levies, or any additional risks beyond those already made and assumed. On an execution for less than $300 the marshal had seized property valued at more than twice that amount. Assuredly he contemplated no further levies, for his duty was done and he only needed protection against the adverse claimants. With full knowledge of the existing facts the bond was given. It recites the claims already made by "one Dixon" and "one Hunt," and was plainly intended to furnish indemnity for the levies already questioned. Evidently, at that time, nothing more was asked on the one hand, or intended to be granted on the other. The common intent and mutual understanding were the same. When, therefore, the marshal, after the goods in the Sixth avenue store had been eloigned, and he had been notified that he would be held responsible by the de-

fendants for their value, levied on the property in the Third avenue store, without their knowledge or consent, he was acting at his own risk, for his sole benefit, and assuming a responsibility which he well knew was beyond the purpose and intent for which the bond was asked or given. Any other construction would operate as a fraud upon the defendants. Literally construed it would make them responsible for trespasses which they did not direct and could not prevent. No such construction of the indemnity is necessary. All its language is satisfied when applied to the first two levies, and is in harmony with the common intention. It is never the purpose of these indemnities to make the obligors responsible for trespasses which they do not direct or authorize. We should not yield to such a construction. The mischiefs resulting would be very great, not only to the parties and to the public, but to the officers themselves.

It is argued, however, that this interpretation rests upon the understanding of one of the parties and not of the other, and that the marshal acted on the faith of the bond "as it is." That is a mistake in both respects. There is no more doubt that the marshal understood this bond, when he took it, to relate wholly to the existing levies and claims, than there is that the defendants so understood it. What he did afterward was not on the faith of the bond "as it is," but as he hoped it would prove to be. He possibly thought it would bear a construction which would enable him, by an adroit stratagem, to shift upon the defendants themselves the burden of their own threat to hold him responsible for his lost levy.

It is further argued that the levy on the Third avenue store was ratified by the defendants. That they received the proceeds of that levy is true, but it was done in ignorance of the fact. It is claimed that their attorneys knew. That is so found by the referee. But the fact does not affect the defendants. Their attorney, as such, had no authority to bind them by directing a trespass or by ratifying one when committed. (*Welsh* v. *Cochran*, 63 N. Y. 181; *Averill* v. *Williams*, 4 Den. 295.) He was not the agent of the defendants for any

such purpose, and could not bind them. Indeed, if we take his version of the transaction, which is most natural and reasonable and given with apparent frankness and sincerity, and corroborated by his clerk, there was not only no authority given to the marshal to make the levy in dispute, or any ratification of it when made, but on the contrary a distinct notification to the officer that he would be held responsible for the lost levy, and if he chose to protect himself by a further levy at the Third avenue store he must do so at his own sole risk. When after this the attorney received the money he had the right to assume that so far as it came from the Third avenue goods it had been collected by the officer at his own risk, and was paid for his own protection. The proof falls far short of any thing like a ratification. If it approached such a result more nearly, it would still be confronted by the difficulty that the acts of the attorney did not affect the defendants. The cases on this subject cited by the appellant (*Newberry* v. *Lee*, 3 Hill, 523; *Armstrong* v. *Dubois*, 1 Abb. Ct. App. 11; *Steward* v. *Wells*, 6 Barb. 79; *Barker* v. *Brahan*, 3 Wils. 396; *Bates* v. *Pilling*, 6 Barn. & C. 38; *Brown* v. *Feeter*, 7 Wend. 301) were all cases in which by some act or direction the party had connected himself with the trespass, and thereby made the attorney his agent for the specific purpose.

The question in the case, therefore, comes back to the construction of the bond. We do not overlook the suggestion of the learned counsel for the appellant, that, giving the rules of interpretation from surrounding circumstances the freest play, it is still apparent that the bond was intended to cover the seizure of the goods in the Third avenue store. He argues that before the execution of the indemnity the marshal *supposed* he had levied on those goods, and so reported to defendants' attorneys. All that he did, as the basis of his alleged supposition, was to go into the store and look around. It taxes credulity to believe that he thought that a levy, and the referee refused to find any such fact. The attorney also denies emphatically that he was told by plaintiff before the

delivery of the bond that he, the plaintiff, had been to the Third avenue store.

We can see no ground, therefore, upon which the plaintiff can rest his case, except a literal and rigid construction of the printed language of the bond. This court has never been unduly swayed in that direction. Our adjudications upon printed forms of insurance policies, and blanks used by carriers to shield their own negligence, rest upon rules of interpretation which may justly be applied to the broad and sweeping terms of official bonds like the one in question. The real and just meaning, and the fair and understood intention, are the only safe guides where the language is open to a doubt. These views cover substantially all the material questions raised on the appeal.

The judgment should be affirmed, with costs.

All concur except RAPALLO, J., who did not vote; FOLGER, Ch. J., concurring in result.

Judgment affirmed.

VIRGINIA N. TAYLOR, Executrix, etc., Appellant, *v.* THOMAS L. WING, Respondent.

Notwithstanding the provision of the Code of Civil Procedure (§ 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc.

(Submitted January 18, 1881; decided January 25, 1881.)

THIS was a motion to advance the cause upon the calendar. The notice of appeal contained no claim of preference.

O. D. M. Baker for motion.

W. Farrington opposed.

DANFORTH, J. Notwithstanding the provisions of section 791 of the Code of Civil Procedure, giving certain preferences

among civil causes in the trial or hearing thereof, it is still necessary for a party claiming a preference in this court to comply with the directions of Rule 20. He must, therefore, in his notice of argument state such claim, and the other facts mentioned in that rule. In omitting these things the plaintiff erred, but it was evidently through misconception of the extent of the statute, and the cause may now take the preference to which it is entitled.

Motion granted, without costs.

All concur.

Motion granted.

FRANCIS SWIFT, Appellant and Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent; THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, Appellant.

Where a particular mode of discharging the obligations of a municipal corporation is provided by law, that mode must be pursued; and it is only when the corporation is put in default in omitting to discharge some duty imposed upon it by statute after the proper steps have been taken, that an action will lie against it, unless it has by some act of its own, outside of the original indebtedness, rendered itself liable.

It seems that under the charter of the city of New York, of 1873 (chap. 335 of the Laws of 1873), although the power of incurring obligations for street cleaning is conferred upon the police department, yet as that department exercises the power simply as one of the executive branches and instrumentalities of the city government and on its behalf, the duty of providing means for their payment and of paying them resting upon the corporation, it could be treated as the debtor; and an action would be maintainable against it.

Maxmilian v. *The Mayor* (62 N. Y. 160), and *Ham* v. *The Mayor* (70 id. 463), distinguished.

The police department, however, having been by the act supplementary to the charter (chap. 755 of the Laws of 1873) intrusted with the payment of its own expenditures through its own treasurer, an action would not lie in the first instance against the corporation for an indebtedness incurred by the street department.

The remedy of the creditor against the police department is by mandamus, not by action.

Statement of case.

An action is not maintainable against a department of a city government.

Plaintiff was employed by the police department in March, 1874, to remove the garbage from the streets at an agreed compensation of $800 per month; the employment terminable at the pleasure of the department, and it was so terminated in July, 1874. Plaintiff's bills were paid for two months. For the residue of the time they were rendered, but not paid. From March, 1874, to January 17, 1877, there was upon the books of the street cleaning bureau of the police department an unexpended balance of appropriations for the year 1874, more than sufficient to pay plaintiff's claim; this was paid into the city treasury on the day last named. Plaintiff duly presented his claim to the comptroller and demanded payment, which demand was not complied with. In an action to recover the balance unpaid, *held*, that the action was not maintainable against the police department; but that as it appeared that at the time plaintiff's claim accrued there was in the street cleaning department moneys sufficient and legally appropriated to the payment thereof, and as after notice thereof the department paid this fund into the city treasury, where, so far as appeared, it still remained, it constituted a specific fund upon which the law impressed a trust for the payment of his claim which the plaintiff was entitled to have so applied; and that as the corporation took the fund with notice of the trust and of plaintiff's claim, an action was maintainable against it to compel the execution of the trust.

Also *held*, that the contract for the work was not within the provision of said charter (§ 91), providing that where work is necessary to be done to complete or perfect a particular job for the corporation, involving an expenditure of over $1,000, the same shall be let by contract, after advertisement, to the lowest bidder; as the work here was not done to complete any particular job, and it did not necessarily involve an expenditure of more than $1,000.

Swift v. *The Mayor* (17 Hun, 518), reversed.

(Submitted November 18, 1880; decided January 25, 1881.)

THESE are cross appeals from a judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made May 22, 1879, affirming a judgment in favor of plaintiff against defendant, the police department of the city of New York, also a judgment in favor of defendant, the mayor, etc., against the plaintiff. (Reported below, 17 Hun, 518.)

This action was brought to recover a balance alleged to be

due the plaintiff under a contract made with the police department for removing garbage, etc.

The facts appear sufficiently in the opinion.

William Hildreth Field for appellant. The police department, being specially charged by law with the duty of cleaning the streets, and being provided with the necessary funds to meet the necessary expenses incurred, is liable. (Laws of 1872, chap. 677; Laws of 1873, chap. 335, § 67; *N. Y. Balance Dock Co.* v. *Mayor*, 8 Hun, 247; *Maxmilian* v. *Mayor*, 2 id. 160.) The city, having received the unexpended appropriation of the street cleaning department for the year 1874, together with the benefit of the work, has made itself liable for his expense. (*Moore* v. *Mayor*, 73 N. Y. 238.)

William C. Whitney for respondent. The police department is an executive department of the municipal government. (Laws of 1873, § 26, chap. 335, p. 491.) Defendant, the mayor, etc., is not liable for a work or supply furnished without the requirements of the charter being observed by reason of an implied liability to pay for work and supplies actually furnished and used. (*McDonald* v. *The Mayor*, 68 N. Y. 21.) The authority to clean streets and remove garbage from the city belongs to the police department. (Laws of 1872, chap. 677, p. 1623; Laws of 1873, chap. 335, § 67; Laws of 1870, chap. 137, § 104; *Greene* v. *Mayor*, 60 N. Y. 306; *Matter of Robbins.*) The city is not responsible for the contracts of the department of police. (*Ham* v. *Mayor*, 70 N. Y. 463; *Dannatt* v. *Mayor*, 66 id. 586; *Maxmilian* v. *Mayor*, 62 id. 160.) The department of police in the city of New York can neither sue nor be sued, and no judgment should have been directed against such department. (*N. Y. Balance Dock Co.* v. *Mayor*, 8 Hun, 247.) The remedy of the plaintiff is by *mandamus* against the board. (*People ex rel. Satterlee* v. *Bd. of Police*, 75 N. Y. 38.)

RAPALLO, J. In March, 1874, the plaintiff was employed by the police department to remove from the city the accumulations of garbage resulting from the cleaning of streets, and

the compensation agreed upon was at the rate of $800 a month so long as his employment should continue. This mode of removal of the garbage was experimental and, therefore, his employment was not for any fixed time, but was terminable at the pleasure of the department. In pursuance of this employment he rendered the stipulated service from March 23, 1874, until July 17, 1874, when his employment was terminated by order of the board. No fault is found with the manner in which the service was performed. His bills for the first two months were duly audited and paid. His bills for the residue of the time were rendered but not paid. From March, 1874, to January 17, 1877, there was upon the books of the street cleaning bureau of the police department an unexpended balance of the appropriation for the year 1874 amounting to upwards of $19,000, and on the 17th January, 1877, this sum was paid by the police department into the city treasury.

The plaintiff duly presented his claim to the comptroller on the 17th of April, 1876, and demanded payment, but no part of it has been paid.

He claims in this action to recover $1,466.67 for his compensation from May 23 to July 17, 1874, at the stipulated rate of $800 per month, with interest. The court, on the trial, dismissed the complaint as to the corporation, but directed a verdict in his favor against the police department. Both parties appeal.

On the appeal of the police department the main question which arises is, whether it is capable of being sued? On the appeal of the plaintiff the questions arise, first, whether the corporation of New York is liable upon obligations incurred by the police department for cleaning the streets, and if so, how such liability can be enforced; and, secondly, whether the work performed by the plaintiff came within the provisions of section 91 of the charter of 1873, Laws of 1873, chapter 335?

As these questions arise under the provisions of that charter, a brief reference to them is necessary.

By section 1, the mayor, aldermen and commonalty of the

city of New York are declared to be a body corporate, with all the powers and privileges theretofore held by it and not modified or repealed. It cannot be doubted that keeping the streets in order and providing for cleaning them, including the removal of garbage therefrom, are among these powers.

By section 2, the legislative powers of the corporation are vested in the common council, and by section 19, its executive power is vested in the mayor and officers of the departments thereby created. The heads of these departments are appointed by the mayor with the consent of the board of aldermen, and are required to report their operations to him, and are removable by him for cause subject to the approval of the governor. (§§ 25, 26, 27.)

Among the legislative powers of the common council specially enumerated, is that of regulating the cleaning of the streets. (§ 18, subd. 8.) Among the departments created, is the police department, and the executive duty of cleaning the streets is, by section 67, imposed upon this department of the corporation. For the performance of this duty it is required to establish a bureau of street cleaning, and an inspector who shall, under the supervision of the board of police, have charge of the cleaning of the streets and public places, and he is vested with the powers and duties formerly reserved to or imposed upon the street inspector in respect to street cleaning, and is required to file with the comptroller monthly a statement showing the number of persons employed each day in the preceding month, and their salary or compensation.

For the purpose of defraying the expenses incurred by the several departments, a board of estimate and apportionment is established, whose duty it is annually, to make a provisional estimate of the amount required to pay the expenses of conducting the public business of the city and county in each department and branch thereof for the ensuing year. This estimate is to show in detail the aggregate amount allowed to each bureau. After the revision and correction provided for by the charter, this estimate is to become final, and the several sums thereby become appropriated to the several purposes and

departments therein named, and the aggregate amount is to be raised by tax.

No expense is to be incurred by any of the departments or their officers, unless an appropriation shall have been previously made covering it. (§ 89.) All contracts are to be made by the appropriate heads of departments (§ 91), and where the amount is not such as to require a contract no expenditure can be made unless the necessity thereof is certified by the appropriate head of department and an appropriation made. (§ 92.)

All payments on behalf of the corporation are to be made by the finance department, the head of which is the comptroller, and this department has control of the fiscal concerns of the corporation. All accounts rendered to or kept in the other departments are subject to the revision of the finance department, which is empowered to settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor or creditor. (§§ 29, 30, 31.) In this department is a bureau for the reception of all moneys paid into the city treasury and the payment of all warrants drawn by the comptroller and countersigned by the mayor, the chief officer of which is the chamberlain. (§ 33, subd 7.) By section 34 authority is impliedly given to pay judgments against the corporation by providing that warrants should only be drawn on vouchers for the expenditure, audited, approved and filed, except in the case of judgments, in which case transcripts shall be filed, and it is provided by section 105, that no action shall be maintained against the corporation unless the claim upon which the action is brought has been presented to the comptroller and he has neglected, for thirty days after such presentment, to pay the same.

If the cleaning of the streets by the police department were carried on under this general system, and the obligations incurred therefor were payable by the finance department of the corporation, there would be little difficulty in holding that where the necessary appropriation had been made, and all the conditions required of the creditor had been performed, he

could, in case of non-payment, maintain an action for the amount due him, against the corporation. The right to maintain actions upon demands against it is expressly recognized, and although in the case of street cleaning the power of incurring the obligations is conferred upon the police department, yet that department exercises the power simply as one of the executive branches and instrumentalities of the city government created for the purpose of performing a duty of the corporation, and the obligations are incurred in its behalf, and if the duty not only of providing means for their payment, but also of paying them out of its treasury through its finance department, rested upon the corporation, I can see no reason why it should not be treated as the debtor and suable as such. The cases of *Maxmilian* v. *The Mayor* (62 N. Y. 160) and *Ham* v. *The Mayor* (70 id. 463) do not affect this question. Those were actions for damages resulting from negligence, and it was held that as the persons guilty of the negligence were not the servants of the corporation, not being either employed or removable by it, or engaged in the performance of any corporate duty, the city was not liable for their negligence. But the ultimate responsibility of the corporation upon contracts entered into, or obligations legally incurred by, the departments of the city government for the benefit of the corporation and payable by the finance department out of the city treasury is not denied in those cases or any other that has been cited.

The general system provided by the charter of 1873 for the payment of expenses or obligations incurred by the several departments is, however, departed from in the case of the police department. By the act supplementary to the charter (chap. 755 of Laws of 1873, § 7), the police department is intrusted with the payment of its own expenditures, through its own treasurer. By this section the comptroller is required to pay over to the treasurer of police the total amount annually estimated, levied, raised and appropriated for the support and maintenance of the police department and force, on its requisition (not exceeding one-twelfth part of the total in any one month), and the board through its treasurer is authorized to pay

all obligations lawfully incurred by or by authority of the board, and it is its duty, if required, to transmit duplicate vouchers for such payments to the finance department.

Under this special system it is very clear that an action will not lie in the first instance against the corporation for an indebtedness incurred by the police department. There must be an appropriation, to create a liability, and if the comptroller pays the sum appropriated to the treasurer of the police department, he has performed his whole duty. The creditor must follow it and look to it for his pay, and if the police department refuses to audit his claim and order payment by its treasurer, the remedy of the creditor is by *mandamus*. If the police department refuse to make a requisition for funds from the comptroller when entitled thereto, or the comptroller refuses to pay them over to the treasurer of police, the directions of the charter in those respects can be enforced by the same process, and in this manner the creditor, if justly entitled, can obtain payment in the manner provided by the charter. Where a particular mode of discharging the obligations of municipal corporations is provided by law, that mode must be pursued; and it is only when the corporation is put in default in omitting to discharge some duty imposed upon it by statute after the proper steps have been taken, that an action will lie (*Dannat* v. *The Mayor*, 66 N. Y. 585), unless indeed it has by some act of its own, outside of the original indebtedness, rendered itself liable, a point which will be considered hereafter.

The appeal of the police department must be sustained. It is a mere department or subdivision of the city government, and is not itself a body corporate, and there is no statute brought to our notice authorizing actions to be brought against it, or providing for the payment of any judgment against it. In *N. Y. Balance Dock Co.* v. *The Mayor* (8 Hun, 247), it was held that the department of public charities could not be sued, although it has the same power of drawing for and disbursing the sums appropriated to its use, and in *People ex rel. Satterlee* v. *Board of Police* (75 N. Y. 38), a *mandamus* against the department, to compel the

board to draw a requisition upon the comptroller for a sum sufficient to pay a balance due a police surgeon for his salary, was sustained; showing impliedly that the appropriate method of obtaining payment from that body is to compel it to perform its statutory duty by *mandamus*, and not by action.

This point requires the reversal of the judgment against the police department, but there is a further question whether there are not circumstances in this case which entitle the plaintiff to maintain his action against the city. It appears and is admitted, that at the time the plaintiff's claim accrued there was in the street cleaning department a sum much more than sufficient to pay the plaintiff's claim, and legally appropriated to the payment thereof, in case his claim was valid, and that it remained there until long after both the police department and the finance department had notice of his claim, and that with such notice the police department paid this fund into the city treasury, and it was there received by the finance department, as an unexpended balance; and for all that appears it remains there still. This was doubtless done upon the supposition that the plaintiff's claim was invalid because the work was not contracted for in the manner prescribed by section 91 of the charter of 1873. But if on examination this defense is found not to be sustainable, this unexpended balance was legally appropriated to its payment, and it constituted a specific fund which the plaintiff had the right to have so applied, and the application of which the court would have compelled. As before shown the only remedy of the plaintiff was to follow this fund and the law impressed upon it a trust for the payment of his claim out of it. It was raised for the express purpose of paying obligations incurred in cleaning the streets. It was placed by the finance department in the hands of the police department for that purpose and no other; the duty of so applying it was imposed by law, and the creditors had the legal right to look to that fund for their payment and in fact were confined to the security which it afforded them. Instead of making the application they returned it to

the corporation, who, if not technically, was in substance the real debtor, who took it with notice, not only of the trust, but of the plaintiff's claim upon the fund. I think it is a proper case for the application of the well-settled rule that one who receives a fund impressed with a trust, and receives it with notice of the trust, is bound and can be compelled to execute it.

By applying this equitable and well-established rule the circuitous method of compelling the finance department to pay the money back to the police department and then compelling that department to order its payment by their treasurer and then compelling him to pay the plaintiff, will be avoided and the same just result will be attained. The complaint contains all the allegations necessary to show that the plaintiff is entitled to this relief and that the money paid into the city treasury, or so much thereof as is necessary to pay the plaintiff's claim, equitably belongs to him, and can be treated as money received to his use.

The only objection made by the defense, on the trial, to the plaintiff's right to payment of his claim, was that the work was not contracted for pursuant to section 91 of the charter of 1873. No other point was made upon the trial in this respect. That section provides that whenever any work is necessary to be done to complete or perfect a particular job for the corporation and the several parts of said work shall together "involve the expenditure of more than one thousand dollars," the same shall be by contract made by the appropriate head of department with the lowest bidder, after advertisement inviting proposals.

The work in question is conceded by this objection to have been done for the corporation, but it was not done to complete any particular job, nor did it necessarily involve the expenditure of more than $1,000. The employment was for a service continuous in its character, but terminable at the pleasure of the employer. The mere fact that it might be continued so long as to cost the city in the aggregate more than $1,000 did not, we think, bring it within the provisions of the section. It was intended to apply to contracts for particular jobs involving

a liability to pay the amount named, not to services for an indefinite period involving no obligation on the part of the city to continue the service. If so, every employment of a laborer or other servant at a certain rate per month might be brought within it, because, if continued long enough, the wages might in the aggregate amount to more than $1,000. In this case the agreement was that so long as the plaintiff should be retained in the employment he should receive pay at the rate of $800 per month. There was no express obligation to retain him even for a whole month, but if one could be inferred, the amount involved did not exceed $1,000.

The judgment against the police department, and the judgment in favor of the corporation should both be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgments reversed.

In the Matter of the Petition of THOMAS H. WALTER to Vacate an Assessment.

The power conferred upon the commissioners of Central park by the act of 1867 (§ 1, chap. 697, Laws of 1867) to change the grade of any of the streets within a district therein specified, in the city of New York, was not subject to, or limited by, the provision of the act of 1852 (§ 2, chap. 52, Laws of 1852), prohibiting the common council of said city from changing the grade of streets without the written consent of the owners of two-thirds, in lineal feet, of the adjoining lands.

Accordingly, *held*, that an assessment for a change in the grade of a street, made by said commissioners under said act of 1867, was not invalidated because of failure to obtain such consent.

(Submitted November 30, 1880; decided January 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made July 1, 1880, affirming an order of Special Term denying an application to vacate an assessment upon certain lots in the city of New York for regulating and grading Fifth avenue from Ninetieth to

One Hundred and Twentieth streets. (Reported below, 21 Hun, 533.)

The facts are set forth sufficiently in the opinion.

G. S. Wilkes for appellant.

William C. Whitney for respondent.

RAPALLO, J. The only ground upon which the assessment is assailed is, that it was imposed for the expenses of changing the grade of Fifth avenue from Ninetieth to One Hundred and Twentieth streets, which had been already graded and regulated at the expense of the owners of the adjoining lands, and that the written consent of two-thirds of the owners of the lands on the east side of said avenue, opposite to the part assessed, was not obtained as required by Laws of 1852, chapter 52.

The act referred to is entitled "An act to make permanent the grades of the streets and avenues of the city of New York," and it provides (§ 1) that such grades, as then fixed and established by the common council south of Sixty-third street, or which shall thereafter be fixed north of Sixty-second street, shall not be changed except as provided by the act.

Section 2 then directs that public notice be given by the street commissioner of any application or intention to make any such change of grade, before it shall be lawful for the common council to take any action in the matter, and that it shall not be lawful for the common council to change the grade of any street or avenue south of Sixty-third or north of Sixty-second street, except upon the written consent of the owners of at least two-thirds, in lineal feet, of the adjoining lands. This is the prohibition upon which the appellant relies.

Section 3 provides for the payment of damages to adjoining lands, and improvements thereon caused by changes of grade.

The change of grade for which the assessment now in question was laid was not made under the act of 1852, nor was it made by the common council or under its authority; but it was made by the commissioners of Central park, under the

authority conferred upon them by chapter 697 of the Laws of 1867.

The act of 1867 was passed for a different purpose from that declared in the act of 1852. While the purpose declared in the act of 1852 was to make the grades of the streets and avenues permanent, that declared in the title of the act of 1867 was to alter the plan of certain portions of the city; and the power to make these alterations, instead of being lodged with the common council, was placed in the hands of the commissioners of Central park, which was a legislative commission entirely independent of the common council, and not subject to any of the restrictions imposed upon that body, except such as might by special provision be made applicable to the commissioners. By this act the commissioners were, among other things, vested with exclusive power to alter or amend the then present grades of any streets or avenues laid out or retained by them within a certain district, which included, among others, a space of three hundred and fifty feet in width surrounding the park. This space included Fifth avenue, from Fifty-ninth to One Hundred and Tenth street, and consequently that part of the avenue which lies in front of the petitioner's lots, they being on Fifth avenue, between One Hundred and Third and One Hundred and Fourth streets. The act of 1867 requires of the commissioners of Central park no notice of intention or application for a change of grade to be given by the street commissioner, nor does it require the consent of property owners, which is required as to changes of grade ordered by the common council, nor can these provisions, by any construction, be made applicable to changes made by the commissioners of Central park. The act of 1867, without requiring any preliminaries, empowers the commissioners to make two maps or plans, showing the streets, avenues, etc., laid out or retained by them; their width, location, etc., and also two similar maps or plans, showing the grades that shall be amended or established by them for the streets, avenues, etc., laid out or retained by them. These maps and plans, when filed as directed, are by section 3 made final and conclusive, as well upon the corporation as upon the property

owners and occupants within the prescribed district, and all persons whomsoever; and all streets, etc., and the grades thereof, not shown or retained on these maps and plans are abolished, and the property reverts to the adjoining owners. The changes of grade made by these commissioners had the same force as if made by the legislature itself.

As to the grades, as fixed or changed by the commissioners under this act, a subsequent change of grade is by section 5 prohibited, unless the owners of two-thirds of the land in front of which the changes are made consent. And the express enactment of this provision of the act of 1852, in respect to such subsequent changes, shows very clearly that it was not considered as in force in respect to the changes of grade first authorized to be made by the commissioners, nor intended so to be. The purposes of the two acts were entirely different. While the act of 1852 took from the common council the power of changing an established grade, without the consent of property owners, the act of 1867 gave full and exclusive power to the commissioners to make changes without requiring the concurrence either of the common council or the landowners. The object, undoubtedly, was to enable the commissioners to harmonize the grades of the streets, etc., with Central park.

The grades of the avenue in front of the petitioner's lots had been established by the common council in 1859, and his property had been assessed for the work. In November, 1867, the board of commissioners of Central park, acting under and by virtue of chapter 697 of the Laws of 1867, changed the grade in front of the petitioner's lots, and filed the required maps and plans. The work of making the avenue conform to the new grade was ordered by the common council in July, 1874, and the assessment therefor was confirmed in December, 1876, and is the assessment now in dispute.

The change of grade was thus legally made and the new grade legally established by the Central park commissioners. It was declared, however, by section 6 of the act, that they had no power to do any work which any of the departments

of the city government were authorized by law to do, but that the work should be done by the proper department, upon the requisition of the commissioners, and on the plan adopted by them. Before the work now in question was done, changes were made by statute, whereby the powers of the commissioners of Central park were transferred to the park department and the commissioner of public works; and no question is presented by the petition as to the manner in which the work in question was ordered and done. It must be assumed that these steps were properly taken; and if the provision of the act of 1852 has no application to the present case, as we think it clearly has not, the petition was properly denied. The only question which is raised by the petition is whether the change of grade was lawfully made in the absence of the consent of property owners. If it was, the right to do the work of conforming to the new grade necessarily followed, and there is no enactment imposing upon the city at large the expense of doing such work, or excepting it from the general provisions for defraying the expense of local improvements. On the contrary, section 9 of the act expressly declares that all acts then in force in relation to opening, grading and otherwise improving streets, and the assessment and collection of the expenses for the same, which are not inconsistent, etc., are applicable the same as if they were incorporated in the act.

It cannot be supposed, as suggested, that the intention of the legislature was that a change of grade might be made without the consent of property owners, but that to authorize an assessment for the expense of doing the work, such consent must be obtained.

The order should be affirmed.

All concur.

Order affirmed.

Statement of case.

In the Matter of the Petition of MAX WEIL to Vacate an Assessment.

Prior to the passage of the New York city charter of 1873 (chap. 335, Laws of 1873) under the provisions of the act of 1871 (§ 1, chap. 226, Laws of 1871), changing the grade of a portion of Ninth avenue, and directing the commissioner of public works to proceed forthwith in such manner as should be deemed necessary and proper to regulate and grade said avenue, according to the grade so fixed, certain maps were filed; one, of the streets intersecting Ninth avenue, the grade of which by said act of 1871 (§§ 2–4), the said commissioner was authorized to change so as to conform to the grade of Eighth avenue, on which map new grades of Ninth avenue appeared; another, a map or profile of the new grade of Ninth avenue. No work, however, had been done upon said avenue, in changing the grade, prior to the passage of the charter, and no contract had been made for such work. *Held*, that the work was not "in progress" within the meaning of the exception of such works in the provision of said charter (§ 91), requiring contracts for work not therein otherwise provided for, to be founded on sealed proposals and let to the lowest bidder; and, the work having been done without a contract let as prescribed, that an assessment therefor was invalid.

Also, *held*, that the work could not be considered "in progress" because other streets referred to in the act of 1871 had been actually graded or the work thereon was in progress when the charter went into effect.

Also, *held*, that the power of the commissioner of public works, under said act of 1871, to do the work unrestricted by the contract system was not preserved by the provision of said charter (§ 73) vesting in the department of public works created by the charter the powers and functions previously possessed by the department of public parks or the department of public works.

(Argued January 18, 1881; decided January 25, 1881.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made May 14, 1880, affirming an order of Special Term, denying an application to vacate an assessment upon certain lots of the petitioner for regulating and grading Ninth avenue in the city of New York, from Eighty-second to Ninety-third street.

The facts appear sufficiently in the opinion.

Herbert A. Shipman for appellant. The common council could not delegate to the commissioner of public works the dis-

cretion with which they were invested of determining in what manner the work should be done. (*In the Matter of the Emigrant Industrial Savings Bank*, 75 N. Y. 388.) The inclusion of the block between Eighty-third and Eighty-fourth street in the contract to regulate Ninth avenue clearly rendered the assessment void. (*In the Matter of Mahan*, Ct. of App.; *In the Matter of the Emigrant Industrial Savings Bank*, 75 N. Y. 388; *Brady* v. *The Mayor*, 22 id.) The work for which the assessment was laid could lawfully be done only by a contract founded on sealed bids or proposals made in compliance with public notice, duly advertised, as provided by section 91 of the charter of 1873 (chap. 335, Laws of 1873). (*In the Matter of the Emigrant Industrial Savings Bank*, 75 N. Y. 388, 390, 396; *In the Matter of Mahan*, decided by Ct. of App. 1880; *In the Matter of Manhattan Savings Institution*, Ct. of App., Sept. 21, 1880.) The words "in such manner as by him shall be deemed necessary and proper" referred only to the character of the work, its constituent parts, material, physical or mechanical characteristics, and not to the manner of employing persons to do the work, nor to the manner of procuring the supplies or materials necessary for it. (*In the Matter of Robbins*, Ct. of App., Sept. 21, 1880; *Rogers* v. *Bradshaw*, 20 Johns. 735, 744; *Rexford* v. *Knight*, 15 Barb. 627, 642, 643.) The necessity of inviting bids for this work was not obviated by including it in a contract with work which might be done without inviting bids. (*In the Matter of Eager*, 46 N. Y. 100.) All contracts, except as to works in progress when the charter of 1873 was passed, must be let at public letting, as provided in section 91 of that charter. (*In the Matter of the Emigrant Industrial Savings Bank*, 75 N. Y. 390.) The action of the commissioner of public works in entering into a contract for this work at prices grossly in excess of the fair market value and of what he was paying for the same character of work where proposals had been received, founded upon advertisements, as required by law, was a fraud upon the property owners. (*In the Matter of Mead*, 74 N. Y. 216; *In the Matter of Raymond*, General Term; *Harrison* v. *Glover*, 72 N.

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Y. 451, 454; *Cliccot's Champagne*, 3 Wall. 143; *Lush* v. *Druse*, 4 Wend. 313; *In the Matter of Mahan*, Ct. of App., not reported; *In the Matter of Robbins*, 82 N. Y. 131; *In the Matter of Manhattan Savings Institution*, id. 142.)

A. J. Vanderpoel for respondent. The act chapter 226 of the Laws of 1871 made it imperative on the commissioner of public works to proceed forthwith with the regulating and grading of Ninth avenue, and gave full power to do this work by days' work, by contract or in any other way he pleased. (*In re Rotschild*, decided at Special Term, November 25, 1879, and affirmed at the General Term in January, 1880; *Greene* v. *The Mayor*, 60 N. Y. 303; *Parr* v. *Village of Greenbush*, 72 id. 463; *Kingsley* v. *Brooklyn*, 78 id. 200.) The power of the commissioner of public works, under chapter 226 of 1871, to do the work without the restrictions of the contract system, was expressly saved to him by the charter of 1873. (*Greene* v. *The Mayor*, 60 N. Y. 303; *Kingsley* v. *Brooklyn*, 78 id. 200; *In re Rotschild, supra;* Potter's Dwarris, 154; *People* v. *Mayor*, 32 Barb. 35; *Ellis* v. *Mayor*, 1 Daly, 103; *Haughwout* v. *Mayor*, 2 Keyes, 422.) The commissioner of public works, in doing this work, acted under the provisions of chapter 226 of Laws of 1871, and possessing lawfully the power to do it, the presumption is that he acted lawfully. (*In re Hebrew Ben. Orphan Asylum*, 70 N. Y. 476; *In re Bassford*, 50 id. 512; *In re Williamson*, 3 Hun, 65–68; *In re N. Y. P. E. Pub. School*, 47 N. Y. 556; *State* v. *Jersey City*, 3 Dutch. 493; *Davis* v. *Bruce*, 82 Ill. 542.) The board of assessors had power to lay the assessment for the expense incurred under the contract with Tracey. (*Newbury Turnpike Co.* v. *Miller*, 5 Johns. Ch. 113; Potter's Dwarris on Statutes, p. 220, note 27; *In re Williamson*, 3 Hun, 65–68; *Bigelow* v. *The City of Boston*, 120 Mass. 326; *Jordan Ditching and Draining Association* v. *Wagoner*, 33 Ind. 50; *State* v. *Jersey City*, 3 Dutch. 493; *In re Ingraham*, 64 N. Y. 310; *In re Eager*, 46 id. 100; *In re McCormack*, 10 Abb. [N. S.] 234.)

Opinion of the Court, per FINCH, J.

FINCH, J. The petitioner in this case seeks to set aside an assessment upon certain lots in the city of New York owned by him, which was imposed for regulating Ninth avenue from Eighty-third to Ninety-second street. The ground of substantial error alleged is, that no contract for doing the work, or any part thereof, for the expense of which the assessment was laid, was made in conformity with the provisions of article 16 of chapter 335 of the Laws of 1873, upon advertisement, or founded on sealed bids or proposals, nor were any bids made for doing said work, or any part thereof, or any competition had therefor. The substantial fact involved in the allegation is admitted. The contract for the work was of a character known as a "special contract," which was awarded without advertising for proposals, and upon a competition solely between a few designated and selected individuals.

The right to make the contract in this manner is claimed by the petitioner to be prohibited by the charter of 1873, and is defended by the corporation counsel upon several grounds.

The provision of the charter (Laws of 1873, chap. 335, § 91) which required contracts to be let to the lowest bidder, upon public and open competition, contains a provision excepting from the operation of the general requirement "such works now in progress as are authorized by law or ordinance to be done otherwise than by contract."

It is claimed that the work for which the disputed assessment was made was within this exception and upon the following state of facts:

In 1871 the legislature passed an act (Laws of 1871, chap. 226) changing the grade of Ninth avenue between Eighty-fourth and Ninety-second streets, and directing the commissioner of public works to proceed forthwith, in such manner as by him should be deemed necessary and proper, to regulate and grade said avenue according to the grade so established. These provisions were contained in section 1 of the act, which section by its terms fixed the grade of Ninth avenue between the specified termini, and left nothing in that respect to be ascertained or determined by the city authorities. The succeeding

three sections of the act authorized the commissioner of public works to change the grades, between Eighth and Tenth avenues, of the streets intersecting Ninth avenue, so as to make the grades conform to that of Eighth avenue; to alter and fix the grades of the streets between Seventh and Eighth avenues intersecting such avenues between One Hundred and Tenth and One Hundred and Twenty-second streets, so as to conform to the grade of such avenues; and to fix and establish the grades of the streets and avenues west of Eleventh avenue and north of West Thirty-third street up to West Fifty-fifth street, those west of Tenth avenue and West street between West Eleventh and West Fourteenth streets, and those extending to the East river north of East Fourteenth street and east of First avenue. As to all these changes of grade, except that of Ninth avenue, a discretion and power of determination was lodged in the commissioner of public works, and he was therefore required, when his conclusion was reached and the grades to be fixed by him were finally determined, to make and file a map or profile of such grades in the office of the comptroller, and a duplicate in the office of the commissioner of public works. Section 1 of the act contained no such requirement, plainly for the reason that the grade of Ninth avenue was fixed and determined by the act itself. The charter of 1873 was passed April 30th of that year. No work was done before that date upon Ninth avenue with a view to the change of grade, nor was any contract made or executed for such work. What is claimed to have been done, and all that is claimed to have been done before the charter of 1873 was the filing of certain maps. The first one put in evidence was denominated "plan showing the grades of Ninth avenue from Eighty-third to Ninety-second streets, as altered, amended and established by the commissioner of public works, under and by authority of chapter 226 of Laws of 1871." As the new grade of Ninth avenue was fixed by the law itself, and the commissioner of public works had no power or authority to alter, amend or establish the fixed grade, the title of the map or plan was erroneous. This more distinctly appears from the certificate of

the commissioner himself, who certifies that it is a map and profile of the grade of the streets intersecting Ninth avenue. This, therefore, was a map and profile of the streets referred to in the second section of the act, and required to be made by that section to show the grades fixed by the commissioner. It was conceded that on this map the new grade of Ninth avenue was shown, but that was plainly incidental to the main purpose of the map, and not a profile made for the specific work of Ninth avenue. The second map introduced was, however, a profile of the grade of Ninth avenue. The witness gives its date as July, 1873, or after the charter of that year was enacted. This is probably a mistake as the legend on the face of the map bears date a year earlier, or July, 1872. The map or profile showed an estimate of the amount of filling to be done, and the natural inference is, that surveys of Ninth avenue had been made with reference to the change of grade, and to ascertain the amount of work to be done. These engineering expenses, by section 6 of the act of 1871, were to be paid out of the general tax, and not assessed upon the property benefited by the specific improvement.

We do not think, on this state of facts, that the proposed or intended change of grade of Ninth avenue was one of the "works in progress" excepted by section 91 of the charter of 1873 from the operation of the contract system thereby organized and required. The reason for the exception was plain. A new and general system for doing the work of the city was inaugurated, entirely inconsistent with modes previously in operation. To attempt its application in cases where those modes were already adopted, and in process of execution, and the work under them was in progress, would of necessity create confusion, and render uncertain and complicated the rights both of the city and its contractors. Such cases were therefore exempted from the operation of the general rule. But no possible reason can be assigned for extending the exemption to cases where no contract had been made, and no actual work was begun, merely because some useful or even necessary preliminaries had been accomplished. The most

which can be said is that certain preparations for the commencement of the work had been made, but the work itself, the enterprise, so to speak, of changing the grade was not begun and was not in progress. If by possibility, in some very broad and general sense, the making of surveys and a profile, and estimates of the filling to be supplied, might be held to justify a statement that the work was in progress, it is yet very clear to us that the phrase was not used in the charter of 1873 in any such broad and general sense, but was intended to be descriptive of cases where the city was already committed to other modes of doing the work, and could not change the system without complication or confusion. No such difficulty existed here. It was entirely possible to change the grade of Ninth avenue by contracts let as required by the charter, without in the slightest degree coming in collision with any different system, or any conflicting rights or duties. (*In re Alicia Dempsey*, per DANIELS, J.)

But it is further claimed that this was a work in progress, because, before the charter of 1873 went into operation, other of the streets referred to in the act of 1871 had been actually graded, or the work was in process of execution. The argument is that the act of 1871 contemplated one general scheme of improvement, and the commencement of any part of the work, on any street described in the act, made it a work in progress as to all the streets and the entire area of improvement. But we think this view of the case is unsound. The act provided, not so much for one general improvement as for a series of separate improvements. As matter of fact, the evidence shows that the several streets were regulated separately, each by its own contractor, as a distinct work, and followed by its own separate and distinct assessment. The suggestion already made is again applicable, that no possible reason exists why, as to streets untouched, and remaining to be graded under separate and distinct contracts, the system of the charter should not apply. We are therefore of opinion that the grading of Ninth avenue was not a work in progress within the meaning of the exception in the charter.

It is next claimed, on behalf of the city, that the power of the commissioner of public works, under chapter 266 of Laws of 1871, to do the work without the restrictions of the contract system, was expressly saved to him by the charter of 1873. The language relied upon is contained in section 73. The obvious intent and effect of that section was to vest in the department of public works, created by the act of 1873, all the powers and functions then or previously possessed by the department of public parks or that of public works. It is therefore insisted that, since by the act of 1871 power was conferred upon the commissioner of public works to grade and regulate Ninth avenue "in such manner as by him shall be deemed necessary and proper," it follows that the department of public works, before the charter of 1873, possessed the power of regulating and grading Ninth avenue by days' work, or special contract, and in the discretion of the commissioner; that such power was transferred to the new department by force of section 73 of the charter; and that the contract system provided for in section 91 worked no change in the power so transferred, because it was only made applicable to contracts, except as in the charter was "otherwise provided." The question thus raised was substantially considered and decided in the case of *Robbins* (82 N. Y. 131). An act, passed May 16, 1873, authorized the department of public works to lay out the Eastern boulevard, and make certain other improvements, and regulate, grade and maintain the same "in such manner as the commissioner of public works may deem expedient." We held that this language did not save the work to be done from the operation of the contract system, and that the phrase "in such manner" related only to the manner in which the work itself should be performed and the character of the improvement. It is quite true that in the case then before the court the discretion of the commissioner as to the character and extent of the work to be done was much wider than in the present, since here the grade was dictated by the act, but enough of discretion remained to the commissioner as to the mode of doing the work itself to make our previous construc-

tion entirely applicable. While the language of the alleged power is not identical in the two cases, it is the same in substance and effect. "As he may deem expedient," and "as he may deem necessary and proper" are synonymous expressions. The construction, therefore, in *In re Robbins* must be the same here, and excludes the theory that by the act of 1871 a discretion uncontrolled was given to the commissioner to dictate for himself whether the contract for the work should be special or general, by the day or by the job, unless such construction is modified by the then existent legislation. But in that event we held also in the *Robbins Case*, upon a very careful examination of the complicated and confused legislation relating to the city by Judge RAPALLO, that the transfer of the powers of the department of public parks, and of the succeeding department of public works, to the new department of the same name, was not intended to free the latter from the effect of section 91 and the operation of the contract system. We there said that it was not intended to confer unrestricted power upon the department of public works to dispense with the contract system in all cases of future street improvements, or to continue such power in that department, or that the transfer to the department of public works of the powers of the department of public parks or of the commissioners of Central park was intended to have that effect. For the foregoing reasons, therefore, we are of opinion that the work in question was not saved from the operation of section 91 of the charter of 1873 by the other provisions of the charter.

Much discussion was had on the argument over the question whether the work of grading Ninth avenue was done under the authority of the act of 1871 or that of an ordinance of the common council, passed December 23, 1873, directing the regulating of Ninth avenue between Eighty-*third* and Ninety-second streets. The southern terminus, under the act, was Eighty-fourth street, so that the ordinance included an additional block. The contract made was for the regulating of Ninth avenue from Eighty-*third* to Ninety-second street, and the assessment following included lots on the north side of

Eighty-third street. It is not denied that the ordinance furnished no competent authority for the special contracts actually made and the assessment based thereon (*In re Emigrant Industrial Savings Bank*, 75 N. Y. 388), but the city relies wholly upon the authority of the act of 1871.

The conclusion we have reached, that, even on that basis, no authority existed to do the work by special contract in the manner actually adopted, renders it unnecessary to debate the further question raised by the petitioner. In either event, whether it be the statute or the ordinance which is relied upon, the assessment was erroneous.

The orders of the General Term and of the Special Term should be reversed, with costs, and the assessment vacated.

All concur, except MILLER, J., not voting.

Ordered accordingly.

GEORGE H. HUDSON, Respondent, *v.* FRANK C. SWAN et al., Appellants.

Replevin will not lie by one tenant in common of a chattel against another for taking the chattel, and if one of them sells his interest to a third party he has the right to deliver the chattel to the purchaser, and neither he nor any one assisting him in so doing is liable to an action.

Where, in the complaint and upon the trial of an action to recover possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and, in any event, before the lien can be restored, the false claim of title must be abandoned, the title of the true owner conceded and the claim reduced to one of lien.

(Argued December 1, 1880; decided January 25, 1881.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made the fourth Monday of September, 1879, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Statement of case.

The nature of the action and the facts appear sufficiently in the opinion.

John Reynolds for appellants. A tenant in common, or joint tenant or partner, cannot maintain replevin against his co-tenant, or copartner, for taking the common property. (Morris on Replevin [3d ed.], 125; *Wilson* v. *Gray*, 8 Watts, 35; *Wright* v. *Bennett*, 3 Barb. 451; *Rogers* v. *Arnold*, 12 Wend. 30; *Russell* v. *Allen*, 13 N. Y. 173; *Davis* v. *Lottich*, 46 id. 393; *King* v. *Phillips*, 1 Lans. 428; *Jones* v. *Brown*, 25 L. J. Exch. 345; *Barnes* v. *Bartlett*, 15 Pick. 75.) Any act or declaration inconsistent with the assertion of a lien extinguishes the right of lien. (*Morgan* v. *Congdon*, 4 N. Y. 553; *Whitaker* v. *Sumner*, 37 id. 405; *Harrison* v. *Scott*, 5 Moore's P. C. 357; Whitaker on Liens, 75; *Coburn* v. *Kerswell*, 35 Me. 126; *Bean* v. *Bolton*, 3 Phila. 93; *Jones* v. *Tarleton*, 9 M. & W. 675; *Bradley* v. *Cole*, 6 Hun, 660; *Wingard* v. *Banning*, 39 Cal. 543; *Mexal* v. *Dearborn*, 12 Gray [Mass.], 336; *Picquet* v. *McKay*, 2 Blackf. [Ind.] 465; *Gillespie* v. *Goddard*, 1 Pittsb. 310; *Evans* v. *Warren*, 122 Mass. 303; *Jacobs* v. *Latour*, 5 Bing. 130; *Parks* v. *Hall*, 2 Pick. 206; *Holbrook* v. *Wight*, 24 Wend. 179; *Smith* v. *Acker*, 23 id. 668, 669; *Allen* v. *Judson*, 71 N. Y. 79; 3 Parsons on Contracts, 238 [6th ed.]; 2 id. 207.) The taking being at the request of Clemence, he was the real party defendant, and is bound to indemnify. (*People* v. *Auditors*, 74 N. Y. 313; *Davis* v. *Lottich*, 46 id. 393, 397, 400.) As to Clemence, Paige and Gilmore, the lien was a secret lien, and if plaintiff wished to preserve it he was bound to put himself on his lien at once. (*Mexal* v. *Dearborn*, 12 Gray [Mass.], 336.) Plaintiff, by pleading full ownership, obviates any necessity there might have been of a tender or demand before the taking. (*Newell* v. *Newell*, 34 Miss. 400; *Thatcher* v. *Harlan*, 2 Houston [Del.], 195; *Perkins* v. *Barnes*, 3 Nev. 557; *Homan* v. *Laboo*, 1 Neb. 204.) If it should be conceded that plaintiff had a valid right of lien which had never been abandoned, he could not recover on the ground of lien. In this form of action the

complaint should set forth all the particulars of the alleged lien. (Morris on Replevin [ed. of 1878], 148; *Curtis* v. *Jones*, 3 Den. 590; *Gillespie* v. *Goddard*, 1 Pittsb. 310, 311; *Depew* v. *Leal*, 2 Abb. 135; *Schofield* v. *Whitelegge*, 49 N. Y. 259; *Pattison* v. *Adams*, 7 Hill, 126; *Wood* v. *Orser*, 25 N. Y. 348.) Plaintiff could not have set up any lien in reply to our defense had the court expressly granted him leave to do so. (*Hart* v. *Fitzgerald*, 2 Mass. 511.) The claim of lien is inconsistent with the claim of sole ownership. (3 Parsons on Contracts, 234; Ewell's Evans' Agency [ed. 1879], marg. p. 362; *McFarland* v. *Wheeler*, 26 Wend. 472; *Jordan* v. *Shoe and Leather Bk.*, 74 N. Y. 473; *Palmer* v. *Lorillard*, 16 Johns. 352-354; *Arnold* v. *Angell*, 62 N. Y. 508; *Schaefer* v. *Henkel*, 75 id. 385; *Hollister* v. *Engelhardt*, 11 Hun, 446; *Natl. Trust Co.* v. *Gleason*, 77 N. Y. 403, 404, 406 and 408.) A party cannot so frame his pleading as that, if he fails in his attempt to sustain it, he can fall back and get inconsistent relief. (*Maxwell* v. *Farnam*, 7 How. 236.) *A fortiori*, he cannot get inconsistent relief where he does not even frame his pleading for it, as here. (*Gillespie* v. *Goddard*, 1 Pittsb. App. 311; *Boynton* v. *Page*, 13 Wend. 431; *Chambers* v. *Hunt*, 18 N. J. L. 345; *Bemas* v. *Beekman*, 3 Wend. 667.) Where a special property man recovers in replevin for a taking by an owner, his recovery is limited to the amount of his special property. (*Allen* v. *Judson*, 71 N. Y. 77; *Wingard* v. *Banning*, 39 Cal. 549; *Ingersoll* v. *Van Bokkelin*, 7 Cow. 680, 681; *Spoor* v. *Hollard*, 8 Wend. 445; *Schley* v. *Lyon*, 6 Ga. 530; *Ullman* v. *Barnard*, 7 Gray, 554; *Dilworth* v. *McKelvey*, 30 Mo. 149; *Seaman* v. *Luce*, 23 Barb. 254; *Russell* v. *Butterfield*, 21 Wend. 302; *Fitzhugh* v. *Winan*, 9 N. Y. 565; Wells on Replevin, § 111; *Wilson* v. *Reed*, 3 Johns. 178; *Butler* v. *Reynolds*, 3 T. & C. 244; *People* v. *Auditors*, 74 N. Y. 313; *Chambers* v. *Hunt*, 18 N. J. L. 343; *Hart* v. *Fitzgerald*, 2 Mass. 512; *Konigsburg* v. *Launitz*, 1 E. D. Smith, 217; *Russell* v. *Allen*, 13 N. Y. 173; *Collier* v. *Yearwood*, 5 J. Baxter [Tenn.]; *Walker* v. *Spring*, 5 Hun, 107; *Azel* v. *Betz*, 2 E. D. Smith,

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191, 196; *King* v. *Phillips*, 1 Lans. 428, 429; 1 Greenleaf's Cruise, 872; 4 Kent's Com. 370; *Jackson* v. *Tibbetts*, 9 Cow. 252; *Reynolds* v. *McCormick*, 62 Ill. 412.) If two persons are tenants in common of a horse or other personal chattel, each has an equal right to the possession and use thereof; and each can sell only his own undivided share thereof. (*King* v. *Phillips*, 1 Lans. 428, 429; Littleton, § 323; *Jones* v. *Brown*, 25 L. J. [Exch.] 345; *Kindy* v. *Green*, 32 Mich. 310; *Barnes* v. *Bartlett*, 15 Pick. 71; *Bliss* v. *Johnson*, 73 N. Y. 534; *Wood* v. *Phillips*, 43 id. 156; *Smith* v. *Orser*, 42 id. 137; *Arthur* v. *Griswold*, 55 id. 408; *Erber* v. *Lorillard*, 19 id. 303, 305; *Harrison* v. *McIntosh*, 1 Johns. 380; 1 Greenleaf on Evidence, § 50.)

Nathaniel C. Moak for respondent. A lien may exist and be created by express contract, in any case, when the parties choose expressly to stipulate for it. (Wells on Replevin, § 167; Whittaker on Liens [1st Am. ed.], 27, 36, marginal pages; *Chapman* v. *Allen*, Cro. Charles, 271; *Kirkman* v. *Shawcross*, 6 Term R. 14; *Rushforth* v. *Hadfield*, 6 East, 518; *Newton* v. *Gardner*, 24 Wis. 232, 233, 234; *Corbett* v. *Nelson*, 53 Penn. St. 322, 325–6, 330; *Baker* v. *Hoag*, 7 Barb. 113, 117–19; *Rich* v. *Ryder*, 105 Mass. 306.) An oral agreement for such a lien, accompanied by possession, is valid between the parties as a chattel mortgage. (*Husted* v. *Ingraham*, 75 N. Y. 257; *Bardwell* v. *Roberts*, 66 Barb. 433, 436; *Ferguson* v. *Union Furnace Co.*, 9 Wend. 345; *Bank* v. *Jones*, 4 N. Y. 497; *Arnold* v. *Morris*, 7 Daly, 498, 506; *Pinch* v. *Anthony*, 8 Allen, 536.) In an action of replevin by one tenant in common against another, where he is entitled to possession, he may recover the full value of the property. He has a right to restoration of possession of the entire property. (*Russell* v. *Allen*, 13 N. Y. 173, 179, 180; *Witham* v. *Witham*, 57 Me. 447, 449; *Ingraham* v. *Hammond*, 1 Hill, 353, 354; *Johnson* v. *Carnley*, 10 N. Y. 570, 576–579; *Allen* v. *Judson*, 71 id. 77; *Fitzhugh* v. *Winan*, 9 id. 559; Sedgwick on Damages, 586, 585, note 4; Field on Damages, § 837.) Conduct based

upon a mistake or upon fraud does not affect a party's rights, if, as soon as the facts are known to him, he properly asserts his real and true rights, particularly if the other party have done nothing in consequence of any thing said or done by the claimant. (*Warner* v. *Blakeman*, 36 Barb. 501; *Day* v. *Roth*, 18 N. Y. 456; *Allen* v. *Spencer*, 1 Edm. 117.) No one is held to have waived a right, unless it appears he knew his rights, or the facts affecting them, and, with such knowledge, intended a waiver of them. (*Estate of Bank*, 60 Penn. St. 471, 479; *Everett* v. *Coffin*, 6 Wend. 603; *Buckle* v. *Handy*, 2 Miles [Pa.], 449; *White* v. *Gainer*, 2 Bing. 23; 9 Eng. Com. Law; 1 Schouler on Personal Property, 496.)

RAPALLO, J. This action was in the nature of replevin, for taking a horse. The plaintiff, by his complaint, claimed the entire title to the horse, alleging that he was the owner and entitled to possession thereof, and that it was of the value of $2,500, and that the three defendants wrongfully took the horse from him and have ever since detained it; and he demands judgment for the return of the horse or its said value.

The defendants, by their answers, justify the taking, on the ground that the defendant Swan, being half owner of the horse and tenant in common thereof with the plaintiff, sold his half interest to the defendant Clemence, and that the taking complained of consisted of the delivery of the horse to Clemence in pursuance of such sale, the action of the defendant Paige in the matter having been had by authority and at the request of the defendants Swan and Clemence.

This answer undoubtedly disclosed a good defense, if true, as it is the settled law and is conceded in the case, that replevin will not lie by one tenant in common of a chattel against another for taking the chattel, and if one of them sells his interest to a third party he has the right to deliver the chattel to the purchaser, and neither he, nor any one assisting him in so doing, is liable to an action. The authorities cited in the briefs fully establish this point.

The parties went to trial on the issue thus raised, and the

plaintiff, to maintain his title, gave evidence to the effect that he did become half owner and tenant in common of the horse with the defendant Swan, and that afterward, and before the sale to Clemence, he purchased the interest of the defendant Swan, and thus became sole owner. This sale of Swan's one-half was denied by the defendants, and was the main fact in issue on the trial, and the circumstances, as detailed in the evidence on the part of the plaintiff, were, in substance, without following the precise order of proof, that before the purchase by the plaintiff of any interest in the horse, George Hudson, plaintiff's father, and Swan were owners and tenants in common thereof, and it was agreed that plaintiff should take the horse and trot him. That Swan and plaintiff's father were to bear one-half of whatever he lost, and were each to get a third of whatever he won, and that plaintiff was to get a third and hold the horse for its expenses, if any, until they were paid. That afterward, in April, 1878, plaintiff purchased his father's interest, and held possession of the horse, and incurred expenses in keeping him, and other expenses which amounted, over and above winnings or earnings, to $794.71, one-half of which sum, viz., $397.36, the plaintiff claimed became due him from Swan, and thereupon, in January, 1879, plaintiff's father, as agent of Swan, sold Swan's interest in the horse to plaintiff for $700, which was paid by plaintiff, to his father as agent for Swan, partly in cash, and partly by canceling plaintiff's bill against Swan of $397.36 for expenses.

The defendants disputed the authority of plaintiff's father to make this sale of Swan's interest, and Swan testified that he never gave such authority or ratified the sale, and there was a direct conflict in the evidence on this point. The question was submitted to the jury, and their finding establishes that no such sale was made and that Swan continued half owner and tenant in common down to the time of the sale of Clemence.

Throughout the trial it was assumed that the plaintiff's right to recover depended upon his claim of sole ownership. A motion for a nonsuit was made, on the argument of which it was stated by the court that the case turned upon the question

whether the plaintiff was sole owner, and no claim was then made that the right to a recovery could rest upon any other ground.

In summing up the case, however, the counsel for the plaintiff for the first time suggested that even if the plaintiff was not the sole owner, he was entitled to recover by virtue of a lien on the horse for his expenses, the defendant not having paid the bill when he took the horse.

The defendants' counsel thereupon insisted that there was no question of lien in the case, and the court replied that it had not noticed that any such question was raised by the testimony, but on being referred to the testimony of the plaintiff as to the agreement that he was to hold the horse for his expenses, the court held that the question of lien was in the case. Thereupon, by leave of the court, defendants' counsel recalled the defendant Swan, who flatly denied the plaintiff's statements in respect to such agreement, or any agreement, to trot the horse or to pay expenses for so doing. The court thereupon submitted to the jury the question whether the plaintiff had proved his alleged sole ownership, and the further question whether, if Swan still remained half owner, he had made the agreement as to the expenses, testified to by the plaintiff, and charged that if the jury found against the plaintiff on the first question, yet, if they found that that agreement was made, then the plaintiff had a lien upon the horse, and had a right to retain it, whether he had bought Swan's half interest or not. This part of the charge was excepted to. The judge then charged that if the jury found for the plaintiff on either of those questions, they must say they found for the plaintiff; instructed them that if they found that defendant Swan was half owner, then they must ascertain whether there was a lien by agreement, and if there was they must assess the value of the property at the amount of that lien, which was half the balance of the bill. To this instruction exception was taken.

The jury having returned a verdict for the plaintiff for $397.36, and assessing the value of the property at $500, being half the value of the horse, the judge instructed them to

amend it by assessing the value of the property at half the bill of expenses, viz., $397, and half the value of the horse, being together $897. To this instruction the counsel for defendants excepted, and especially to that part which directed the jury to find the value of the lien, and the counsel for defendant Swan took a special exception on his behalf on the ground that the verdict showed that the jury had found the question of total ownership adversely to the plaintiff, and in this exception the counsel for the other defendant appears to have joined, and also demanded that the jury be polled. The court thereupon instructed the jury as matter of law that in assessing the value of the property they must take half what they found to be the amount of the bill and add to that half the value of the horse. To this the counsel for all the defendants excepted.

The counsel for the appellants claimed that under the pleadings in this action no recovery could be had without establishing the allegation that the plaintiff was owner of the property, and that, being defeated on that issue, he could not recover on the ground that he had shown a lien thereon. No objection was however made at the trial upon that ground and it is hardly worth while to consider it as a much more important question is presented which if determined in the appellant's favor is decisive of the case.

It does not appear that the plaintiff at any time until the summing up of the case asserted any lien upon the property, but, on the contrary, claimed to be sole owner, which claim is inconsistent with that of a lienor, inasmuch as one cannot have a lien upon his own property. This point is we think presented by the exceptions taken. The charge that if the plaintiff failed to establish his claim as owner he might still recover if the jury found he had a lien, was excepted to, and we think this exception raises the point. The true ground of this exception was not at first stated, but as it was an objection which could not have been obviated, it was hardly necessary to state any ground therefor. The true ground, however, was very nearly stated at the close of the case and before the verdict was recorded, and was in substance that the jury having found

adversely to the plaintiff on his claim of sole ownership, he could not recover as having a lien.

The validity of this objection is well sustained by authority. A claim of ownership has frequently been held fatal to a claim of lien. This is not merely a question of pleading. If the pleadings in this case had been amended, and all the facts which were proven had been set out in detail, the result would have been the same. The plaintiff came into court claiming to be sole owner of the property. He testified to a purchase thereof and payment of the consideration, part of which was the extinguishment of the very claim for which he is by the verdict and judgment declared entitled to a lien. At no stage of the proceedings did he concede the defendants' title and limit his claim to one as lienor. No opportunity was given to the defendants to discharge any such lien. The plaintiff denied its existence, by claiming as sole owner, and down to the last moment maintained that claim, and submitted it to the jury, who found against him. He must, in this action at least, stand or fall upon that claim, and we think it was error to instruct the jury that he could fall back upon his alleged lien. Many of the authorities hold that such a claim absolutely extinguishes a right of lien, and that it cannot be revived. But assuming that the General Term were right in holding that where the claim has been made under a mistake of fact, as for instance reliance upon the supposed authority of an agent, it may be corrected, and the lien restored, yet, before that can be done, the false claim of title must at all events be abandoned, and the title of the true owner conceded and the claim reduced to one of lien. This case contains no such feature; the plaintiff stood throughout on his alleged title, alleged no mistake, but, on the contrary, testified positively and distinctly to a ratification by the defendant Swan in person of the sale of his interest to the plaintiff, by plaintiff's father as agent; and the truth of this statement was one of the matters submitted to the decision of the jury. The judgment may have done substantial justice in the case, but it is impossible to sustain it without disregarding the rule that a claim of ownership is incon-

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sistent with a claim of lien, and that both cannot be asserted at the same time. That a claim of ownership waives the lien, even if one exists, and that consequently one who makes a claim of ownership as against the true owner, cannot, if his alleged title turns out to be unfounded, fall back upon his lien. (*Everett* v. *Saltus*, 15 Wend. 474, 478; *S. C.*, 20 Wend. 267; *Holbrook* v. *Wight*, 24 id. 169, 179.) The rule is most frequently applied in cases where a defendant who claims to retain property fails to set up his lien, or makes some claim, or does some act inconsistent therewith. But it is equally applicable to a plaintiff who, as against one who turns out to have a better title than himself, claims as owner, when he has nothing but a lien. The rule was so applied in *Mexal* v. *Dearborn* (12 Gray, 336), and the plaintiff was adjudged to have precluded himself from recovering by virtue of his lien.

There are various other questions in the case which we have not deemed it necessary to consider, the point discussed requiring a reversal.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur, except ANDREWS, J., not voting.

Judgment reversed.

EDGAR WILLIAMS et al., Executors, etc., Respondents, *v.* LORRAIN C. FREEMAN et al., Appellants.

At the time of the execution of the will of F. he had seven adult children living, the issue of a former marriage, and one infant daughter, the issue of a second marriage. By his will he devised to each of two of his adult children certain real estate, with this direction as to each: "That on a final division and settlement" of his estate, the property so devised "be taken into account as a part" of the share of the devisee in the testator's estate, "and for that purpose be valued at $10,000, but without interest or any charge for the use thereof." The will then declared that he had advanced to another adult child moneys equivalent to said devises, and directed that the same be charged to said child as an advance on "final settlement and division" on account of his share without interest. The

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executors were directed to pay to each of the four other adult children $10,000 as an equivalent for the provision made for the three, "the same to be charged to them respectively, but without interest, on a final settlement * * * as an advance on account of their respective shares." The executors were directed to invest $25,000 for the benefit of his wife and infant daughter, on the death or remarriage of his widow the income to be payable to the daughter during life, and the principal, upon her death, to her issue. The testator then declared that no gifts he might thereafter make to his children should be charged to their account on final settlement, unless he should have uncanceled, on his decease, some written evidence thereof signed by them. The executors were directed to divide the residuary estate, "share and share alike," among his children, excepting one, and any children born to the testator after the date of his will; each of the children named who should survive the testator to "have the use and benefit of one of said equal shares for life," and at his or her decease the principal to go to his or her issue, if any; if not, to his or her next of kin, "according to law." After the execution of the will, and before the testator's death, another child was born, and all of said children were living at the time of his death. In an action to obtain a construction of the will, *held*, that the infant children were entitled to share equally with the adults in the whole estate; and that the said specific devises, bequests and advances should be charged to the beneficiaries respectively, and taken into account as part of his or her share on division of the residuary estate.

Also, *held*, that oral testimony, or writings of the testator not attested as a will showing a contrary intent, being in direct contradiction of the plain terms of the will, were incompetent as evidence and ineffectual to change those terms.

The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will.

By a codicil the testator reduced the valuation of one of the parcels of real estate so devised to $8,000, and directed the balance of $2,000 to be paid to the devisee to make her equal with the others. It gave the whole income of the $25,000 to his widow, and directed that upon her death or remarriage it should revert to the estate, and directed that upon the final division the two infant children, and any other children who might thereafter be born, should be included and share equally with those named in the residuary clause. *Held*, that the codicil did not change or affect the provision of the will as to the distributive shares on final division, or that giving to each child a life estate only in the remainder.

(Argued December 21, 1880; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an

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order made July 1, 1879, affirming a judgment, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are set forth sufficiently in the opinion.

Theodore F. Miller for appellants. It was error to receive extrinsic evidence as to the sources from which the testator received his property in aid of construction, in view of the clear unambiguous provisions of the will. (1 Redfield on Wills, 500, 501; *Mann* v. *Mann*, 1 Johns. Ch. 231; *Van Nostrand* v. *Moore*, 52 N. Y. 18; *Earl of Hardwicke* v. *Douglas*, 7 Cl. & Fin. 815; *Weatherhead* v. *Baskerville*, 11 How. [U. S.] 357; *Reynolds* v. *Robinson*, 10 Weekly Dig. 520.)

Lucien Birdseye for respondents. The intention of the testator must govern if it can be ascertained, and if it is not in hostility to any express provision of law. (*Kane* v. *Gott*, 24 Wend. 640, 659; affirming 7 Paige, 521; *Savage* v. *Burnham*, 17 N. Y. 561, 577; *Chrystie* v. *Phyfe*, 19 id. 344, 348; *Oxley* v. *Lane*, 35 id. 340, 349–350.) Such intention is to be ascertained from the entire will taken together, and not from any separate clause. (1 R. S. 748*, § 2; *Covenhoven* v. *Shuler*, 2 Paige, 122, 129–130; *Egerton* v. *Conklin*, 25 Wend. 224–238; *Brown* v. *Lyon*, 2 Seld. 420; *Arcularius* v. *Geisenheiner*, 3 Bradf. 64; *Burtis* v. *Doughty*, id. 287.) Upon the proof of a will evidence may be introduced to supply a deficiency; to remove an obscurity; to show and explain a mistake; to give effect to expressions that are unmeaning or ambiguous; or to construe those which are used with reference to the customs or usages of a trade or business, or where founded on the habits, knowledge, position or conduct of the party executing the writing. (*Price* v. *Page*, 4 Vesey, 679; *Parsons* v. *Parsons*, 1 id. 601; *Smith* v. *Coney*, 6 id. 42; *Ex parte Hornby*, 2 Bradf. 42; *Jones* v. *Newman*, 1 W. Blackst. 60; *Colpoys* v. *Colpoys*, Jacob [4 Eng. Ch.], 451; *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326; *Mosely* v. *Martin*, 27 Ala. 216; *Potter* v. *Rowland*, 4 Seld.

448; *Curtis* v. *Hitchcock*, 10 Paige, 399; *Hunt* v. *Adams*, 6 Mass. 519.) The court may look to antecedent and surrounding facts and circumstances, to ascertain the meaning of a writing; may take proof of the meaning of technical or other phrases, and of facts known to and acted upon by the party executing the paper. (*Blossom* v. *Griffin*, 3 Kern. 509; *Griffiths* v. *Hardenberg*, 41 N. Y. 464; *Almgren* v. *Dutilh*, 1 Seld. 28; *Collender* v. *Dinsmore*, 55 N. Y. 200; *Sergeant* v. *Adams*, 3 Gray, 72; *Woods* v. *Lain*, 4 id. 322; *Doe* v. *Burt*, 1 T. R. 701; *Seaman* v. *Hogenboom*, 21 Barb. 398; *Carey* v. *Thompson*, 1 Daly, 35; *Cole* v. *Wendall*, 8 Johns. 116; *Fish* v. *Hubbard*, 21 Wend. 651; *Smith* v. *Wilson*, 3 B. & Ad. 728 [23 E. C. L. 169]; *Bradley* v. *The W. A. & G. Steam Packet Co.*, 13 Peters, 89; *Persch* v. *Dickson*, 1 Mason, 1; *Astor* v. *Union Ins. Co.*, 7 Cow. 202; *Collender* v. *Dinsmore*, 55 N. Y. 200; of "C. O. D."; *Dana* v. *Fiedler*, 2 Kern. 40.)

RAPALLO, J. This action was brought by the executors of the will of Lorrain Freeman, deceased, for the purpose of obtaining a construction of certain provisions of the will, and a codicil thereto.

The question on this appeal, as stated in the complaint, is whether, under the provisions of the will and codicil, the two minor children of the testator, Laura R. Freeman and Ida M. Freeman, who are his issue by a second marriage, are entitled to share equally with the adult children, in the whole estate; or whether his adult children, who are the issue of a former marriage, are preferred to the extent of $10,000 each. The court, at Special and General Term, held that the adults were entitled to the preference claimed, and from that decision this appeal is taken.

The testator died September 22, 1875, leaving him surviving his widow, Mary E. Freeman, and seven children, viz.: Lorrain C. and Edward M. Freeman, Sarah E. Raynor, Adelaide Williams, Deborah D. Willeber, Susan A. Dixon, Amy H. Kellogg, all adults, children by his first marriage, and the two above-named infants, children by his second marriage.

The provisions of his will upon which the question now at issue arises are as follows:

The will bears date July 9, 1873. By the second clause he devises to his son, Lorrain C., a house and lot in East Orange, New Jersey, in fee, and declares: "And it is my will that, on a final division and settlement of my estate, this property so devised to him be taken into account as a part of his share of my estate, and for that purpose be valued at $10,000, but without interest or any charge for the use thereof."

By the third clause he devises to his daughter, Amy H., his dwelling-house and land in Woodbridge, New Jersey, and declares that he does this in accordance with the wish of her mother, that the property may remain in the family. Then follows the declaration: "And it is my will that, on a final division and settlement of my estate, this property so devised to her be taken into account as a part of her share of my estate, and for that purpose be valued at $10,000, but without interest or any charge for the use thereof."

The testator then declares that he has already executed deeds to his said son and daughter for the two pieces of real estate above devised to them, and directs his executors to deliver the same, unless he does it while living.

By the fourth clause he declares as follows: "I have already advanced to and for my son Edward, in various ways, moneys equivalent to the above devises to Lorrain and Amy; and it is my will that the same be charged to him, on a final settlement and division of my estate, as an advance of $10,000 on account of his share thereof, but without interest."

By the fifth clause he directs his executors to invest $25,000 for the benefit of his wife Mary during her life or widowhood, and to pay her the interest, for the use of herself and their daughter Laura, who is one of the infant defendants. On the death or remarriage of the testator's widow, the income of this fund is to become payable to Laura during her life, and the principal to her issue after her death.

By the ninth clause the testator directs his executors to pay to his daughters, Sarah, Susan, Deborah and Adelaide, the

sum of $10,000 each, out of his estate "as an equivalent to the provisions made for Edward, Lorrain and Amy, the same to be charged to them respectively but without interest, on a final settlement of my estate, as an advance on account of their respective shares."

He then declares that it is his will that no gifts that he may thereafter make to his children, or any of them, shall be charged to their account on a final settlement unless he shall preserve some written evidence thereof with their signatures, and the same shall be found uncanceled at his decease.

After various other specific bequests, including a bequest of a fund in trust for a sister during her life, the eleventh clause disposes of his residuary estate as follows:

"Eleventh. All the rest, residue and remainder of my estate, real and personal, after paying and providing for the bequests and devises above mentioned (and the trust funds hereinbefore directed to be set apart and invested, when the parties for whose benefit they are thus set apart shall depart this life), I direct my executors to divide share and share alike among my daughters Sarah E., Deborah B., Adelaide and Amy H., and my sons Edward M. and Lorrain C. of my children now living, and any children that may be born to me after the date of this my will." Provision is then made for the case of the death of either of said children before the testator, and the clause proceeds: "And my will is that each of my children above named who shall survive me shall have the use and benefit of one of such equal shares for life and at his or her decease the principal thereof shall go to and be divided equally among his or her issue if any; and if none, then among his or her next of kin according to law."

These are all the portions of the will which have any bearing upon the question at issue, and it is proper to consider them in the first place without reference to the memorandum put in evidence, or the codicil or the oral evidence admitted under objection.

At the date of the will Laura was the only child of the second marriage; Ida M., the other infant, not having then been

born. Laura and the testator's widow were by the will to take no share of the residuary estate, but were separately provided for by the $25,000 trust. The residuary estate was to be divided among the two sons and four of the daughters of the testator living at the date of the will, and any children who might be born to him after that date. The shares of the residuary estate were not to be paid over to the legatees, but to be held in trust for them.

Ida M. having been born to the testator after the date of the will, and all the children being alive at the testator's death, it is evident that according to the terms of the will the residuary estate was to be divided into seven parts, or shares. The direction is that it be divided share and share alike, and if the devises and bequests of $10,000 each to the adult children had been absolute and unaccompanied with any direction as to their effect upon the division of the residuary estate, the adult children would undoubtedly have been entitled to retain these amounts in addition to their shares of the residue. But nothing can be plainer than that the testator intended that these devises and legacies should not be in addition to their shares of his residuary estate, for he qualifies all these devises and bequests by declaring in the clearest and most explicit terms, as to the money legacies bequeathed to the daughters, that they shall be deemed an advance on account of their shares, and be charged to them as such on a final settlement of his estate, and as to the real estate given to Lorrain and Amy that in each case on a final division and settlement of his estate, the property devised shall be taken into account as a part of the share of the devisee and for that purpose valued at $10,000, and as to the son Edward that the advances already made to him shall be charged to him as an advance of $10,000 on account of his share of the estate on a final settlement and division thereof. It is impossible, in the face of this explicit language, so to construe the will as to hold that the devises and bequests of $10,000 each are intended to be in addition to and not to form part of the shares of the adult children on the division of the residuary estate. And any oral evidence introduced for the

purpose of showing such an intent was in direct contradiction of the plain terms of the will.

It is suggested that the directions in respect to charging the gifts of $10,000 each to the adult children were superfluous if the testator intended that all his children should share equally. This is quite an erroneous view. The testator desired to give to two of his children specific pieces of property as part of their shares; another child he desired to charge with money already advanced as part of his share. The other adults he desired to place on an equality by giving them in money, sums sufficient to equalize the shares, and the substance of the whole will is, that each of the adult children (except the son Edward) is to have $10,000 absolutely, and the rest of their shares of his estate is to be held in trust. For some reason, not explained, one of the daughters (Susan) is to have only the $10,000 legacy. The second wife and her child living at the date of the will are separately provided for, but in case any other child should be born, such child is to have a full share of the estate. In making this provision the testator did precisely what the law would have done had he made no mention of any after-born child (2 R. S. 65, § 49), except that if the after-born children had been left to the protection of the statute, they would have taken their shares absolutely instead of for life, and in order to effectuate the intention of the testator that all his children should stand on an equality in all respects it was indispensable to provide that the specific devises and bequests to the adult children should be charged to them as part of their shares on the final division. The will is clear and perspicuous in its terms, and it is only in the effort to change them that any obscurity or difficulty arises.

Thus far neither the memorandum, the codicil, nor the oral testimony have been considered.

The memorandum forms no part of the will, and is not attested in such manner as to form a testamentary declaration. It is merely a parol declaration of the testator, introduced for the purpose of aiding in the interpretation of his will, and comes under the head of extrinsic evidence.

If this evidence was introduced for the purpose of proving that the testator, when he said in his will that the legacies of $10,000 each were to be charged to the legatees respectively as part of their shares of his estate on a final division, did not mean that they were to be so charged, it was incompetent and inadmissible. The intent of a testator expressed in his will cannot be changed by his parol declarations *dehors* the will. If offered for the purpose of showing that the testator had received property through his wife, it was mere hearsay and not evidence of the fact. But assuming it to be legitimately in the case, it simply declares that the testator has divided among his children, either by means of advances made in his life-time or by the provisions of his will, all moneys derived from his first wife. The purpose of this declaration would seem to be to inform his adult children that they were to expect nothing by reason of their mother's property, except what they had already received or were to take under the will. But however construed, and even if it showed that the provisions of the will did not conform to the testator's intentions respecting the property derived through the first wife, or that such provisions were not such as met the approval of the court, the memorandum conferred upon the court no power to amend them. The declarations of a testator can never be resorted to for the purpose of contradicting, or even explaining, the intentions expressed in the will. The statute which requires these intentions to be expressed in writing, attested in a prescribed form, precludes any other proof of them except the writing, and such facts and circumstances as are necessary to its intelligent reading. If the testator had expressly declared in writing, not attested as a will, that he did not mean by his will that these legacies should be deemed part of the shares of his adult children, but that on account of their mother's property they should be in addition to such shares, evidence of such a declaration would have been clearly inadmissible.

The oral testimony which was admitted was to the effect that the testator received through his wife, property amounting to something less than $15,000, in the year 1852 or 1853, and

from this fact it is sought to engraft upon the testator's will a provision preferring his adult children to the amount of $70,000, by holding that the legacies of $10,000 each are to be in addition to their shares of the residuary estate, where the will plainly says and repeats several times that they are to form part of the shares, and be charged as such.

If the fact proved shows any thing, it is that the testator might, with propriety, have made some discrimination between the different sets of children; but it is no ground for putting an interpretation upon the will different from the language used. The language is sensible, intelligible, and, indeed, more than ordinarily clear. In such a case extrinsic proof cannot vary it.

We finally come to the codicil. This, so far from throwing any doubt upon the meaning of the provisions of the will, shows that the testator understood what he had said, and intended just what he had said, in his will.

In the first clause of the codicil he directs that the valuation of the house and land at Woodbridge, New Jersey, devised to his daughter Amy, be reduced from $10,000 to $8,000, and that the balance of $2,000 be paid to her to make her equal with the others. This clearly referred to the sum with which she was to be charged on the final division on account of the devise.

The third clause changes the disposition of the $25,000 given in trust for the testator's widow and child Laura. It gives the whole income of the $25,000 to the widow, and directs that on her death or remarriage the principal revert to his estate; and in the fourth clause he directs that on the final division of his estate his daughters Laura and Ida M. (who had been born since the date of the will), and any other children who might be born after the date of the codicil, be included, and share equally with his other children named in the eleventh clause of his will.

There is nothing in the codicil in any manner changing or affecting the provisions of the will, which direct that on such final division the legacies and devises to the adult children be

counted as part of their shares, and charged to them at the sums named, on the final division.

It seems to us too clear for controversy that the intention of the testator, as expressed in the will and codicil, was that all his children, except Susan, should share equally in his estate, and that on the final division the sums of $10,000, directed to be charged to each of the adult children, be deemed part of their respective shares; so that each adult shall, on such division, receive such a sum as would, with the addition of $10,000 without interest, be equal in amount to the share allotted to each infant.

We see no intention expressed in the codicil to change the provision that each child shall have a life estate only in his or her share received on the final division, with remainder over, as directed in the eleventh clause of the will. That direction extended to children who might be born after the date of the will, and the only change effected by the codicil is to include Laura (as well as Ida and any other after-born child) in the division, instead of providing for her out of the $25,000 trust. The intention apparently was that the tenure of all the children should be the same, except as to so much of the shares of the adult children as had already been advanced, or was given in the form of specific legacies.

So much of the order of the General Term as affirms the fourteenth clause of the judgment of Special Term, being the clause which adjudges that the adult children are entitled to be preferred to the infants, and that such infants are not entitled to share equally with the adults in the whole estate, should be reversed and judgment entered in conformity with this opinion; and so much of the order of the General Term as affirms the fifteenth clause of said Special Term judgment, being the clause which adjudges that the infants are only entitled to a life estate in their shares, should be affirmed.

Costs of all parties in this court should be paid out of the estate.

All concur.

Judgment accordingly.

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MARTIN PAYNE, Appellant, *v.* THE TROY & BOSTON RAILROAD COMPANY, Respondent.

In an action to recover damages for alleged negligence, plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men.

While plaintiff was driving his mare across the track of defendant's road at the intersection of two streets in the city of T., her foot caught between the planking and one of the rails and she was injured. Upon the trial of an action to recover damages, plaintiff's evidence was to the effect that there was over three and one-fourth inches between the plank and the rail, while two and one-quarter inches was all that was required for the passage of the flanges of the car wheels, and because of this the horse's hoof got into the open space and the toe calk caught under the rail; that the plank was from one-fourth to three-eighths of an inch higher than the top of the rail; and that the crossing was constructed differently from others upon defendant's road and upon other railroads. Plaintiff was nonsuited on the ground that there was no evidence of negligence on the part of defendant. *Held*, error; that the question of negligence was one of fact for the jury.

(Argued December 22, 1880; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 19, 1879, which affirmed a judgment in favor of defendant, entered upon a nonsuit and affirmed the order, denying a motion for a new trial.

This action was brought to recover damages for injuries to plaintiff's mare, alleged to have been caused by defendant's negligence.

The facts appear sufficiently in the opinion.

R. A. Parmenter for appellant. Defendant was liable for damages resulting from its negligence in not properly constructing the crossing and allowing it to get out of repair. (*Wooster* v. *Forty-second and Grand Street R. R. Co.*, 50 N. Y. 203; *Rockwell* v. *Third Avenue R. R. Co.*, 64 Barb. 438; Shearman & Redfield on Negligence, § 446.) To charge the de-

fendant with liability for the injury done required no previous notice that the space between the plank and the rail was too wide. (*Griffin* v. *The Mayor, etc.*, 9 N. Y. 456.) The fact that the track was out of repair, and that an injury had been caused by it, was strong evidence of negligence on the part of the defendant, and the burden was upon the defendant to produce countervailing proof to shift the responsibility from it to the plaintiff. (*Maloy* v. *N. Y. C. R. R. Co.*, 58 Barb. 182.) The question of negligence should have been submitted to the jury. (*Casey* v. *N. Y. C. and H. R. R. R. Co.*, 78 N. Y. 518; *Massoth* v. *D. and H. C. Co.*, 64 id. 524.)

Esek Cowen for respondent. The evidence was not sufficient to allow the jury to base a verdict of negligence upon it. (*Toomey* v. *Railway Co.*, 91 O. L. 146; *Cotton* v. *Wood*, 98 id. 572.)

MILLER, J. The plaintiff's mare was injured while he was driving her slowly, and crossing the defendant's railroad at the intersection of two streets in the city of Troy, by her left hind-foot being caught between the planking and the southerly iron rail of said railroad.

The testimony upon the trial was conflicting in regard to the alleged defects in the planking of the crossing and the condition of the same at the time of the injury. It was proved by the plaintiff, upon the trial, that the plank was so placed that there was a space of a little more than three and one-quarter inches between the plank and the iron rail, which space was for the passage of the flanges of the wheels of the cars; and the evidence of the plaintiff showed that two and one-quarter inches was all which was required for that purpose, and hence the space was at least one inch wider than it should have been, and this, it was claimed, caused the horse's hoof to get into the open space and to be caught by the toe-calk under the iron rail. It also appeared, from the evidence introduced by the plaintiff, that the plank was from one-quarter to three-eighths of an inch higher than the top of the rail. At the

close of the testimony a motion was made for a nonsuit, upon the ground that there was no evidence that the company was guilty of negligence in the construction of the crossing, or that the crossing was improperly constructed, or that it was any more dangerous on account of the planking or the width of the opening. The motion was granted, and the plaintiff excepted.

The evidence tended to show that the crossing was constructed in a manner different from other crossings upon the defendant's railroad and upon other railroads; that the space between the plank and the rail was wider than was necessary, and thus the danger of traveling over the crossing was increased; and it was claimed that this mode of construction and of maintaining the crossing, as well as the fact that the plank was higher than the top of the rails, established negligence on the part of the defendant. The question of defendant's negligence, as the evidence stood, was one of fact for the consideration of the jury; and if there is any evidence from which a jury might find in favor of the plaintiff, the case should not be withdrawn from their consideration. The testimony here as to the defendant's negligence is not very strong, and the case is a very close one on the question of such negligence; yet it was not so destitute of facts and circumstances for the consideration of the jury, and so clear against the plaintiff, as to leave no room for doubt, and to justify the court in holding that there was no evidence of negligence. It is a well-settled rule, that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. (*Wolfkiel* v. *Sixth Avenue R. R. Co.*, 38 N. Y. 49; *Weber* v. *N. Y. C. & H. R. R. R. Co.*, 58 id. 451; *Hart* v. *H. R. Bridge Co.*, 80 id. 622.) The plaintiff's case is manifestly within the rule laid down in the cases cited. The track of the defendant's road being across a public highway, it was its duty to construct and keep the same in such a manner as would subserve the legiti-

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mate purposes of the corporation, and, at the same time, interpose no serious obstructions to the public travel on the highway across the railroad, and cause injury to horses while crossing the railroad.

The question whether this was done was one of fact; and, while it may well be that the width between the rail and the plank originally was no more than was usual, and the widening thereof was occasioned by the ordinary travel on the railroad, without any want of care or any negligence of the defendant, this was a matter for the jury to determine, upon the proof given and the circumstances presented, as triers of fact. It was not, we think, for the court to say, in the face of the evidence introduced by the plaintiff, although the testimony was contradicted, that there was no question for the jury, and to direct a nonsuit.

We are, for the reasons stated, of the opinion that the court erred in granting the nonsuit, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLGER, Ch. J., and RAPALLO and EARL, JJ., dissenting.

Judgment reversed.

CATHERINE M. WOOD, Respondent, *v.* GEORGE C. WOOD, Impleaded, etc., Appellant.

In 1844 certain premises were conveyed to plaintiff, a married woman, for life, as and for her own separate estate, free from the control of her husband, her husband covenanting for a consideration expressed that she should hold the premises to her own separate and sole use, free from any claim or interference from him. In an action to recover possession of the premises, brought against the husband and his tenant, *held*, that under the law as it existed when the deed was executed, plaintiff could, in equity, enjoy the property separate from her husband; that a trustee was not required to be named in the instrument, as in case of such omission the law created the husband a trustee for the wife; that the effect of the acts in relation to married women (chap. 200, Laws of 1848; chap. 375, Laws of 1849; chap. 90, Laws of 1860; chap. 172, Laws

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of 1862) was to change her equitable right to hold a separate estate into a legal estate, to give her the right of control and management the same as if she were a *feme sole;* that there was no occasion for her to resort to the Supreme Court, under the act of 1849 (§ 2), for the resignation and surrender of the trustee and a conveyance to her; and that as, by the said acts, she was given the power to sue and be sued, she could maintain the action.

Also, *held*, that as it appeared that the husband had not acquired possession by the consent of the plaintiff, he was not entitled to notice to quit.

Also, *held*, that the fact that the defendant had put valuable improvements upon the land was no defense to the action.

It seems that one who has put improvements upon the lands of another is at the best only allowed to thereby mitigate the damages by offsetting them to the extent of the rents and profits claimed. To do this he must be a *bona fide* occupant; he cannot be allowed them if he has acted with knowledge of the owner's right.

(Argued December 22, 1880; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made July 18, 1879, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 18 Hun, 350.)

This was an action to recover possession of certain premises, situate in the county of Suffolk, in possession of defendant Velsor as tenant of defendant Wood. The defendant claimed title and right of possession in defendant Wood as husband of plaintiff.

The facts are sufficiently set forth in the opinion.

J. J. Perry for appellant. This action cannot be sustained by the wife against her husband. (*Darby* v. *Callaghan*, 16 N. Y. 71.) A deed is to be construed so as to carry into effect the intention of the parties, which is to be ascertained from the whole deed. (6 Johns. 53; 1 Wend. 388; *L. I. R. R. Co.* v. *Conklin*, 32 Barb. 381; *Seman* v. *Austin*, 33 id. 9.) The deed only gives a life estate to the plaintiff, which at the date of the same vested the right of possession in the husband. (2 Kent's Commentaries, p. 115, § 134.) An annuity given in trust to a married woman for life, "to pay the same to her and

her assigns," will not exclude the husband's rights. (2 Story's Equity, §§ 1380–1383, p. 819.) In 1844, the date of the deed, the husband, under the law as it then existed, had the undoubted right of possession, and no act of the legislature since passed can deprive him of his rights then vested. (*Ryder* v. *Hulse*, 33 Barb. 264; *Thurber* v. *Townsend*, 22 N. Y. 517; *Snyder* v. *Snyder*, 3 Barb. 621; *Perkins* v. *Cotrell*, 15 id. 446; *Smith* v. *Colin*, 17 id. 157; *Watson* v. *Barney*, 2 Sandf. 405; *Hurd* v. *Cass*, 9 Barb. 336; *Clark* v. *Clark*, 24 id. 531; Story's Equity Jurisprudence; *White* v. *Wager*, 25 N. Y. 330; *Chambers* v. *Hanelly*, 3 J. J. Marsh. 98; *Jackson* v. *Seck*, 19 Wend. 339; *Gregg* v. *Hesson*, 1 Black, 150; Wait's Actions and Defenses, 77, 78; *In the Matter of Winne*, 1 Lans. 508; *Zimmerman* v. *Schœnfels*, 3 Hun, 692; *Hatfield* v. *Sneden*, 54 N. Y. 280; *Wilson* v. *Arenty*, 70 N. C. 670.) Under the evidence defendant is a tenant and entitled to a notice before the action. (3 Wait's Actions and Defenses, 47; *Dean* v. *Drake*, 2 Green, 523; *Russell* v. *Fabyan*, 34 N. H. 23; 3 Wait's Actions and Defenses, 49; *Chamberlain* v. *Pratt*, 33 N. Y. 47; *Williams* v. *Potter*, 2 Barb. 316; *Mayor, etc., of N. Y.* v. *Campbell*, 18 Barb. 156; *Wood* v. *Salmon*, 4 Wend. 327; *Doe* v. *Stennett*, 2 Esp. 717; *Doe* v. *Watts*, 7 T. R. 83; *Doe* v. *Browne*, 8 East, 166; *Phillips* v. *Covert*, 7 Johns. 4; *Jackson* v. *Salmon*, 4 Wend. 327; *Bradley* v. *Cowl*, 4 Cow. 347; Adams on Ejectment, 145, note.) Any facts which the defendant can show which go to disprove the plaintiff's right, or the unlawful entry or unjust withholding of the defendant, constitute a legal defense. (3 Wait's Actions and Defenses, 95; *Stow* v. *Russell*, 36 Ill. 18; *Requa* v. *Holmes*, 26 N. Y. 338; *Corkhill* v. *Landers*, 44 Barb. 218; *Thompson* v. *Egbert*, 1 Hun, 484; *Parder* v. *Lindley*, 31 Ill. 174; *Connor* v. *Michels*, id. 148; *Smith* v. *Miller*, id. 157; *Woodhull* v. *Rosenthal*, 61 N. Y. 382; *Cropsey* v. *McKinney*, 30 Barb. 47; 54 Me. 445; 18 Ala. 229; 1 Cold. [Tenn.] 404.) Upon marriage the husband becomes entitled to a freehold in his own right in the real estate of his wife. (*Clarke's Appeal*, 79 Penn. St. 376; *Van Note* v. *Downey*, 4 Dutch. [N. J.] 219; 45 Ala. 370;

36 id. 80; 21 Ga. 161; *Porch* v. *Fries*, 3 Green [N. J.], 204; *Gray* v. *Mathis*, 7 Jones' Law [N. C.], 502; *Prall* v. *Smith*, 2 Broom [N. J.], 244.) In equity, where there are no trustees appointed, the husband will be considered as trustee of his wife. (Reeves' Dom. Rel. 258 [3d ed.]; *Hawkins* v. *Carrotter*, 2 Porter [Ala.], 463; *Piquet* v. *Snow*, 4 Nassau, 455.)

Thomas Young for respondent. A *feme covert* with respect to her separate property is in equity considered a *feme sole*. (*Strong* v. *Skinner*, 4 Barb. 552, 553; *Am. Home Missionary Society* v. *Wadhams*, 10 Barb. 597; 2 Story's Eq. Jur., §§ 1381, 1382; *Billings* v. *Baker*, 28 Barb. 359, 360; *Rider* v. *Hulse*, 33 id. 267; *Rieben* v. *White*, 43 id. 97; *The Fireman's Ins. Co.* v. *Bay*, 4 Barb. 414; 2 Story's Eq. Jur., § 1380; 2 Bright's Husband and Wife, 214, 216; *Peck* v. *Brown*, 26 How. 372; *Martin* v. *Martin*, 1 N. Y. 473, 478; *Yale* v. *Dederer*, 22 id. 460; Laws of 1848, chap. 200.) The possession of the defendant Wood, under the circumstances of this case, has not been an adverse possession. (*Vandevoort* v. *Gould*, 36 N. Y. 639, 643.) A married woman can maintain an action of this kind against her husband. (*Wright* v. *Wright*, 54 N. Y. 437, 444; *Minier* v. *Minier*, 4 Lans. 421; *Strong* v. *Skinner*, *supra*, 555; 2 Story's Eq. Jur., § 1368.) The fact that the defendant improved the property constitutes no defense. (*Minier* v. *Minier*, 4 Lans. 424.) No demand of possession is necessary; it is an immaterial allegation if made. (*Ford* v. *Sampson*. 30 Barb. 183.)

FOLGER, Ch. J. The premises in question were conveyed to the plaintiff by deed in 1844, for her natural life only. She was then, and ever since has been the wife of the defendant Wood, and they have had for years, children of their marriage. The deed, however, conveyed the premises to her, as and for her own separate estate free from the control of her husband. In addition to that, the defendant covenanted with the grantor, *pari passu* with the execution of the conveyance, and for a

consideration expressed, that the plaintiff should hold the premises to her own separate and sole use, free from any claim or interference from the defendant. The effect of the deed is to be determined by the law as it was before the married woman's acts of 1848, and subsequently. At law the husband then acquired in the wife's freehold interest in lands for life a freehold interest in himself during their joint lives. (*Polyblank* v. *Hawkins*, 1 Doug. 329.) And so it was if lands were conveyed to her during coverture. (*Junction R. R. Co.* v. *Harris*, 9 Ind. 184.) Nor could the legislature take away this vested right. (*Westervelt* v. *Gregg*, 12 N. Y. 202.) But in equity there was recognition of a capacity in a married woman to enjoy property separate from her husband; and that too where she came by it during coverture. (*Steedman* v. *Poole*, 6 Hare, 193.) The language of the deed to the plaintiff, in the case in hand, "only as and for her own separate estate, free from the control of her husband," is sufficient to create a separate estate in her, as any language will effect that end, where from the nature of the transaction, or from the whole context of the instrument, that intent appears. (*Stanton* v. *Hall*, 2 Russ. & Mylne, 180.) Nor need there have been a trustee named in the instrument. (*Bennet* v. *Davis*, 2 P. Williams, 316; *Douglas* v. *Congreve*, 1 Beav. 72; *Davidson* v. *Atkinson*, 5 Johns. 434.) The law would create the husband a trustee for the wife in such case. (*Parker* v. *Brooke*, 9 Ves. 583; *Rich* v. *Cockell*, id. 369.) Thus it stood with these lands, and the rights of the plaintiff and defendant in them, when the married woman's acts were passed. The effect of these acts was to give to a married woman, over all the property that she owned, the same control and power of management that she would have had had she been sole, with certain exceptions as to the manner of binding it for a debt, not now to be considered. (Laws of 1848, chap. 200, p. 307, § 2; Laws of 1860, p. 157, chap. 90, §§ 1, 3, 7; Laws of 1862, p. 343, chap. 172, §§ 1, 7.) In the case in hand, as by the deed to the plaintiff, there was no trustee named, and as the husband would be held by equity as trustee for his wife, there was no occasion for a

resort by the plaintiff to the Supreme Court, under the second section of the act of 1849 (Laws of 1849, chap. 375, § 2, p. 528), for the resignation and surrender of the trustee, and a conveyance to her. Those statutes by their own operation changed her capacity to hold a separate estate as a matter of equity, into a legal estate, and she thereby became entitled to control and manage it, as if she were a *feme sole*. As by those statutes she was given the power to sue and be sued (Laws of 1860, *supra*, § 7; Laws of 1862, *supra*, § 3), she could bring an action to recover the possession of the premises, if she had been unlawfully ousted. (*Darby* v. *Callaghan*, 16 N. Y. 71.) And if her husband is the person who has thus ousted her, she can sue him. (*Wright* v. *Wright*, 54 N. Y. 437.) It is claimed that it was the intention of the grantors to the plaintiff, that the lands should be held by her and the defendant jointly, as a homestead for themselves and family. We are not able to gather that intention from the language of the deed, but do gather the contrary. The oral testimony tends to show that the purpose was to shut out the defendant from any legal or equitable interest in the lands that could be reached by creditors, and if he got no such interest, what interest did he take that he can set up against the legal title of the plaintiff, and her right of sole and absolute possession? Nor is the plaintiff estopped from asserting her title and right of possession, by any thing that has taken place between the parties. The defendant has never been misled as to the true state of the case. He has always known as much as the plaintiff has, of the legal rights created by the deed. Nor has he done any thing, or parted with any thing, in reliance upon any declarations of the plaintiff not consistent with the true state of the facts as they now appear. It is insisted that no notice to quit has been given to the defendant, and that this action is premature for that reason. The facts do not show that the defendant was entitled to one. He was not a tenant at will, or by sufferance created by holding over his term or otherwise, so as to bring him within the requirement of 1 Revised Statutes, page 745, section 7. He never had the posses-

sion of the premises. The possession was always hers, or that of her tenants. The possession was taken under the deed to her, of course as her possession, by virtue of her title. That the defendant was upon the premises was because he is her husband, the head of the family, and he went there as such. She has been the lessor of it, and in the receipt of the rents and profits. She took the actual possession at the last, and he went on to the premises with her. By reason of his conduct toward her she went away off from them, and he stayed, but not in any way as a tenant at sufferance, because he never had an interest in them, nor any possession growing out of an interest. (*Knowles* v. *Hull*, 99 Mass. 562.) For like reason he was never a tenant at will of the plaintiff. He never acquired possession by the consent of the plaintiff. He is more like one who has by a trespass come into the *pedis possessionem* of the lands. A point is made, that the trial court erred in excluding oral testimony of the fact that the grantor of the plaintiff left a will. There are no data in the case from which we can judge of the pertinency of the fact; or of the will itself, if there was one.

It appears that the defendant has put improvements upon the land of more or less value. It is claimed that because of that it would be unjust to deprive him of the possession. At the best, one who puts improvements on the land of another is allowed no more than thereby to mitigate the damages, by offsetting them to the extent of the rents and profits claimed. Then he must be a *bona fide* occupant. If he has acted with a knowledge of the owner's rights he may not be allowed them at all. (*Woodhull* v. *Rosenthal*, 61 N. Y. 382.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

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MANASSEH BRIGGS et al., Appellants, v. ALEXANDER WALDRON, Respondent.

Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case.

The liability of a stockholder of a corporation organized under the act authorizing the incorporation of gas-light companies (chap. 37, Laws of 1848) to the creditors of the company imposed by said act (§ 10) until the whole capital stock has been paid in and certificate thereof filed, is not limited to the original incorporators, but applies as well to those becoming stockholders after the incorporation.

It seems, that the complaint in an action brought by a creditor against a stockholder, under that act, is defective when it omits to state that the capital stock had not been paid in and certificate filed at the time the debt was incurred.

It seems, also, that the certificate of a clerk of the proper county as to the non-filing of the certificate is defective where it omits to state that diligent search for it has been made in his office, as required by section 921 of the Code of Civil Procedure.

Although the plaintiff in an action fails to make out his cause of action, on trial, the defendant is not, in all cases, entitled to have a verdict directed which will be a final bar to plaintiff's right of action; where the defense set up is a release from liability, and this is not made out so conclusively as to entitle defendant to have a verdict directed in his favor thereon, he is entitled to a nonsuit, not to a verdict.

(Argued December 22, 1880; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 11, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict and affirming an order denying a motion for a new trial.

This action was brought by plaintiff, as a creditor, against defendant, as a stockholder of the Citizens' Gas-light Company of Long Island City, a corporation organized under the act authorizing the formation of gas-light companies (chap. 37, Laws of 1848).

The complaint contained three counts. The first alleged an indebtedness of the company upon its promissory note,

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dated February 10, 1876, and averred that on that day the whole amount of the capital stock of the company had not been paid in or certificate filed. The second and third counts set forth other notes: one given February 14, 1876, and the other March 11, 1876. There was no averment in these counts that at the date specified the capital stock had not been paid in and certificate filed.

The answer set up, among other things, a release of the defendant.

The further facts appear sufficiently in the opinion.

Joshua M. Fiero for appellant. There was absolute failure to prove that the plaintiffs were the owners of the claim and judgment, and entitled to sue as such. (*Clark* v. *Phillips*, 21 How. 87; *McKee* v. *Murphy*, 34 N. Y. Supr. Ct. 261; *Brown* v. *Decker*, 21 Hun, 199.) There is no proof of the issuance and return of execution. (*Chase* v. *Lord*, 77 N. Y. 1–33.) There was no proof that the capital stock had not been paid in full or that a certificate of such payment had not been filed or recorded, as required by law. (Laws of 1848, chap. 37, §§ 10, 11; *Rogers* v. *Jackson*, 19 Wend. 385.) The action must be prosecuted in the names of all the real parties in interest. (*Brown* v. *Decker*, 21 Hun, 199.) A covenant not to sue, without any limitation of time, operates as a release of the debt and may be pleaded in bar. (*Phelps* v. *Johnson*, 8 Johns. 54; *Morgan* v. *Smith*, 70 N. Y. 537; *Rowley* v. *Stoddard*, 7 Johns. 209; *Dezzing* v. *Bailey*, 9 Wend. 336; *Bk. of Poughkeepsie* v. *Holston*, 5 Hill, 461.) There was a good and valuable consideration for this agreement. (*White* v. *Baxter*, 71 N. Y. 254; Addison on Contracts, 13; 1 Parsons on Contracts, 451; *Sands* v. *Crooke*, 46 N. Y. 564; *Willett* v. *Sun Ins. Co.*, 45 id. 45; *Train* v. *Gold*, 5 Pick. 380; *L'Amoreux* v. *Gold*, 7 N. Y. 349; *Hilton* v. *Southwick*, 17 Me. 303.) The defendant is not liable, not falling in the class described and made liable by the act. (Laws of 1848, chap. 37, § 10; *Mellard* v. *Lake Ontario, A. & N. Y. R. R. Co.*, 9 How. 238; *McCloskey* v. *Cromwell*, 11 N. Y. 593; *Rathbun* v. *Acker*, 18 Barb.

393; *Supervisors Niagara* v. *People*, 7 Hill, 511; *Chase* v. *Lord*, 77 N. Y. 1–33; *Harger* v. *McCullough*, 2 Den. 119.) The true doctrine is, that no alteration can be made or allowed in the laws of incorporation of a company, by which new and additional objects are to be accomplished, or new responsibilities incurred, so as to bind individuals without their consent. (Sedg. on Stat. Law, 425; *Hartf. & H. R. R. R.* v. *Cromwell*, 5 Hill, 384; *Middlesex Turnpike Co.* v. *Locke*, 8 Mass. 268; *Waller* v. *Harris*, 20 Wend. 555–6, etc.; Sedg. on Stat. Law, 261; *Newall* v. *People*, 7 N. Y. 97; 18 Barb. 393; 11 N. Y. 593; 9 Hun, 238; *Lake Ont. Bk.* v. *Mason*, 16 N. Y. 451; *Dayton* v. *Borst*, 7 Bosw. 115; *Spear* v. *Crawford*, 14 Wend. 20; *Davis* v. *French*, 4 Hun, 292; *Dorris* v. *Sweeney*, 64 Barb. 636.) By taking the notes of the company, extending as they did the time, having them discontinued, the liability of all stockholders was waived. (47 Barb. 159; *Hart* v. *Hudson*, 6 Duer, 294; *Moss* v. *McCullogh*, 5 Hill, 133; *Miller* v. *White*, 50 N. Y. 137.)

L. B. Bunnell for respondents. The president had authority to give the notes, the goods purchased by him being necessary for the business of the company, and used by it. (*Woodruff & Beach Iron Works* v. *Chittenden*, 4 Bosw. 406; *Moss* v. *Rossie Galena Lead Co.*, 5 Hill, 137.) Assumpsit lies against a corporation on an implied promise. (*Danforth* v. *President, etc.*, 12 Johns. 227; *Dunn* v. *St. Andrew's Church*, 4 id. 118; *Smith* v. *Law*, 21 N. Y. 296, 299, 300.) The plaintiffs were the real parties in interest. (*Byxbie* v. *Wood*, 24 N. Y. 607; 2 Bosw. 267.)

RAPALLO, J. The complaint was clearly defective as to the notes made on the 14th of February and 11th of March, 1876. It does not state that the capital stock had not been paid in and a certificate filed at those dates, and the statement made in reference to the note of February 10 is not repeated in respect to the two subsequent notes. A motion was made on the trial to dismiss on the ground of the insufficiency of the

complaint, but the ruling of the court on that motion was not excepted to, and we cannot, therefore, review it. No objection was made to any of the evidence on the ground that it was not admissible under the pleadings, and consequently no point is before us in respect to them.

The certificate of the clerk of Queens county of the non-filing of the certificate was also defective in that it was not in the form prescribed by section 921 of the Code. It did not state that diligent search had been made for the certificate, and whether the official seal of the clerk was attached to it does not appear.

It was not, however, objected to on either of those grounds, but the only ground specified was that it did not state that the capital stock had not been paid in full. This objection was clearly untenable. There was evidence that in fact the whole capital had not been paid in, some of the stock having been issued to the defendant without payment. We find no material exception in the case. It presents no substantial point for our consideration.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Upon the decision of a subsequent motion for a reargument the following opinion was handed down:

RAPALLO, J. This case was decided on the ground, among others, that although upon the trial some objections were taken on the part of the defendant which should have been sustained, the rulings of the court upon them were not excepted to. The counsel for the defendant now moves for a reargument, claiming that this court must have overlooked a statement contained in the case showing that it was understood upon the trial that an exception followed every objection. It does appear that at the beginning of the trial, upon an objection being overruled and an exception taken, the court directed that to whatever should be objected to the stenographer should

enter an exception, and the defendant's counsel thereupon stated: "We will have it understood that an exception follows every objection on this trial;" which statement does not appear to have been dissented from. This court did not overlook the alleged stipulation, but regarded it simply as entitling the defendant, on the settlement of the case, to have exceptions entered to such rulings as he might desire to have reviewed upon appeal. If it went farther and was intended to govern the action of the appellate tribunals, and require them to review rulings to which no exception was entered in the case, we cannot give effect to it. The provisions of law which require a party, desiring to review rulings upon a trial, to take exceptions in proper form, are established for the convenience of the courts as well as for the protection of the parties, and the latter cannot, by stipulation, have their cases heard on appeal without regard to those provisions.

The direction given by the court was that an exception should be noted by the stenographer whenever an objection was taken. The court did not undertake to order that its decisions might be reviewed without inserting exceptions in the case. It was the duty of the appellant to see that all exceptions, upon which he intended to rely, were properly noted. This seems also to have been his understanding, for numerous exceptions are noted to rulings made after this direction was given; and these are the only rulings open to review here.

We examined these exceptions on the argument and did not consider any of them tenable. The one on which the appellant now relies and which he thinks was overlooked was to the refusal of the court to direct a verdict for the defendant. The counsel for the appellant is in error in supposing either that this exception was overlooked, or that it brought up all the points which he sought to raise upon this appeal. It brought up only the question whether he was entitled to have a verdict directed in his favor. Even if the plaintiffs had failed to prove their case, and ought to have been nonsuited, it does not follow that the defendant was entitled to have a verdict directed which would be a final bar to the plaintiffs' right of action.

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The defense set up, and which would have been established by a verdict, was a release from liability. It cannot be contended that this defense was made out so conclusively as to entitle the defendant to have a verdict directed in his favor; and even if there was any thing to submit to the jury it cannot avail the defendant as no request was made to go to the jury, but both parties requested that the case be disposed of by the court.

None of the other exceptions which appear in the case are of sufficient importance to require comment.

If the objections which we thought well taken were substantial and could have affected the final result, we might have been inclined to afford the appellant an opportunity to apply to the court below for a resettlement of his case, and the insertion of the proper exceptions. But they relate wholly to matters of form and do not affect the merits. The defect in the complaint was amendable, and the informality in the clerk's certificate could readily have been corrected. There is no pretense that the certificate was not true. The point that the statute imposing liability upon the stockholders of the company applied only to original stockholders or corporators, and not to persons becoming stockholders after the formation of the company by transfer or otherwise, we consider too unsubstantial to require discussion. We find no point in the case which would warrant us in granting a reargument.

The motion should be denied with $10 costs.

All concur.

Motion denied.

JAMES B. KING, Plaintiff in Error, *v.* The PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

It is not an essential element of the offense of keeping a disorderly house that the public should be disturbed by noise; the keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house.

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When the house of a person is the resort of prostitutes, plying their vocation, with his knowledge, this constitutes a bawdy house.

Upon the trial of an indictment for keeping a disorderly and common bawdy and gambling house, after the court had charged that if the defendant kept a gambling house, where gamblers resorted to play for money, and did so play to the knowledge of defendant, he was guilty, defendant's counsel asked the court to charge that the playing of cards in defendant's house did not, of itself, make it a gambling house. The court, in reply, said, "Except that it is the gambling for money that makes it a disorderly house." *Held*, no error; that the court had properly defined the offense of keeping a gambling house, and its remark clearly referred to a house of that character.

(Argued January 17, 1881; decided January 25, 1881.)

ERROR to the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 4, 1880, which affirmed a judgment entered upon a verdict convicting the plaintiff in error of the offense of keeping a disorderly and common bawdy and gambling house.

The facts, so far as material, appear in the opinion.

N. C. Moak for plaintiff in error. The court erred in refusing to charge defendant's request: "That the playing cards in defendant's house does not, of itself, make it a disorderly house." (2 Wharton's Cr. Law [8th ed.], § 1465; id. [7th ed.], § 2407; *People* v. *Sergeant*, 8 Cow. 139; 2 Hawkins' Pleas of the Crown [Leach's ed.], 145, chap. 75, § 6; 1 Bishop's Cr. Law [6th ed.], § 1135; to same effect, §§ 504, 1106; 2 Arch. Cr. Pl. & Pr. [8th ed.] p. 1767; Laws of 1851, chap. 504, p. 943; *Hitchens* v. *The People*, 39 N. Y. 454.) The court erred in charging the jury that "it is not necessary, to constitute the offense, that the public should be disturbed by noise," and in refusing to charge, that in order to convict they must find that his house was so kept as to annoy and disturb the persons near or having occasion to pass it. (*People* v. *Sergeant*, 8 Cow. 140; *Mains* v. *State*, 42 Ind. 327, 328; 1 Bishop's Crim. Law, §§ 1046, 1051; *Hunter* v. *Commonwealth*, 2 Serg. & Rawle, 298, 299, 300; *People* v. *Mauch*, 24 How. Pr.

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278; *Boyd's Case*, 3 City Hall Rec. 134; *Jacobowsky* v. *People*, 6 Hun, 524, 525; 64 N. Y. 659; *Barnesciotta* v. *People*, 10 Hun, 137; *People* v. *Carey*, 4 Park. 238; *People* v. *Baldwin*, 1 Wheeler's Crim. Cases, 279–286; *People* v. *Rowland*, id. 286, 287, 288; *People* v. *Clarke*, id. 288–292; 3 Inst. 205; Hawkins, chap. 75, § 7.) The court erred in charging that "if prostitutes came to this saloon for the purpose of prostitution and there consummated their intent to the knowledge and with the consent of the defendant, you will find him guilty." (*Harwood* v. *The People*, 26 N. Y. 191.)

H. A. Howard, district attorney, for defendant in error. An indictment for keeping a disorderly house is not vitiated by charging, in the same count, that it is kept as a bawdy house, a tippling house and a dancing house. Evidence of any one of these circumstances will sustain the count. (2 Colby's Crim. Law, 143; *People* v. *Carey*, 4 Park. Cr. 238.) The conducting of a house in such a way as to tend to the corruption of public morals, makes it a disorderly house. (*People* v. *Baldwin*, 1 Wheeler's Crim. Cas. 285; *People* v. *Rowland*, id. 286; *People* v. *Clark*, id. 290, 291, 292; *People* v. *Carey*, 4 Park. Cr. 238; *Jacobowsky* v. *People*, 6 Hun, 524; 64 N. Y. 659; *Barnesciotta* v. *People*, 10 Hun, 137; 2 Archbold's Crim. Pr. [8th ed.] 1766.) The evidence as to a vulgar image being exhibited at the prisoner's saloon was properly received. (Wharton's Crim. Ev., § 261 [8th ed.]; *People* v. *Mauch*, 24 How. Pr. 276.) The prosecution had as much right to show what was said as what was done. (Wharton's Crim. Ev., § 262 [8th ed.]; *People* v. *Weed*, 56 N. Y. 628; *People* v. *Pierson*, 18 Hun, 252; *People* v. *Stout*, 4 Park. Cr. 71.) It is competent to show that the prisoner attempted to bribe, or intimidate witnesses. (Wharton's Crim. Ev., §§ 742, 749, 750 [8th ed.]; *Adams* v. *People*, 9 Hun, 89, 94, 95.) What was at common law a nuisance is not made otherwise by a statute prohibiting it, and giving a new remedy. (2 Colby's Crim. L. 73; *Candee* v. *Hayward*, 37 N. Y. 656; *Wetmore* v. *Tracy*, 14 Wend. 250.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The indictment charges the plaintiff in error with keeping a disorderly and common bawdy and gambling house, concluding *ad commune nocumentum.* The evidence abundantly sustained the charge, and justified the jury in finding that the defendant kept a house to which gamblers and prostitutes resorted for the purpose of gambling and prostitution.

The court, in the course of the charge, stated to the jury that it was not necessary, to constitute the offense of keeping a disorderly house, that the public should be disturbed by noise, and refused to charge that, in order to convict the defendant of keeping a disorderly house, the jury must find that the house was so kept as to disturb, annoy and disquiet the neighbors and the people passing and repassing the house. An exception was taken to the charge in this respect and to the refusal to charge as requested.

The exception was not well taken. The keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house and an indictable nuisance at common law. (*Rex* v. *Dixon*, 10 Mod. 335; 1 Hawk. P. C. 693.) It is a public offense, for the reason that its direct tendency is to debauch and corrupt the public morals, to encourage idle and dissolute habits and to disturb the public peace. It is not an essential element that it should be so kept that the neighborhood is disturbed by the noise, or that the immoral practices should be open to public observation. The law, it is true, gives a remedy by indictment against those who unduly disturb the quiet of a community by noises which tend to impair the enjoyment of life, but it does not refuse cognizance of those for greater public injuries, which arise from practices which destroy the peace of families and disturb and undermine the foundations of social order and virtue.

The court also charged, that if prostitutes came to the defendant's saloon for the purpose of prostitution, and there consummated their intent, to the knowledge and with the consent of the defendant, the jury should find him guilty. The defendant's counsel excepted, and requested the court to charge that,

in order to find the defendant guilty of keeping a bawdy house, the jury must find that he kept his house for the resort and unlawful commerce of lewd people of both sexes. The court said: "I have charged the jury on that subject, and decline to change my charge; I have substantially so charged;" and exception was taken to the refusal of the court to charge as requested. In this there was no error. If the defendant's house was the resort of prostitutes plying their vocation there, to the knowledge of the defendant, the house was a bawdy house; and this was what in substance the court charged, and the court, in stating that it had charged substantially as requested by the defendant's counsel, gave the defendant the benefit of the definition contained in his request.

The defendant's counsel requested the court to charge that the playing of cards in the defendant's house does not, of itself, make it a gambling house; and the court, in reply, said: "Except that it is the gambling for money that makes it a disorderly house." The defendant's counsel excepted. The request was directed to the point that the mere playing of cards in a house did not constitute the house a gambling house; and the remark of the court, in response to the request, amounted to an assent to this proposition.

The defendant's counsel claims that the remark is to be construed as affirming that if the jury should find that the defendant permitted gaming in his house on a single occasion he could be convicted. But the remark of the court is to be construed in connection with the previous charge and the occasion on which it was made. The court had stated to the jury that if the defendant kept a gambling house, where gamblers resorted to play for money and did so play, to the knowledge of the defendant, he was guilty. The counsel requested the court to charge a specific proposition, which the court substantially consented to, and added the element to which the defendant's request pointed, viz., that the playing must be for money in order to make the house a gambling house. If the defendant desired a specific instruction upon the point now made, he should have requested it. The court had properly defined the

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offense of keeping a gambling house, and the remark of the court clearly referred to a house of this character.

These are all the exceptions relied upon by counsel. We think none of them are well taken. and that the conviction should be affirmed.

All concur.

Judgment affirmed.

CARLOS A. RUGG et al., Appellants, *v.* JONATHAN G. RUGG, Respondent.

The failure of recollection of the subscribing witnesses to a will, as to what occurred at the time of signing, will not defeat the probate thereof if the attestation clause and the surrounding circumstances satisfactorily establish its execution.

An executor of a will is a competent witness to prove its due execution, although not a subscribing witness.

(Submitted January 17, 1881; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, entered upon an order made the second Tuesday of June, 1880, affirming a decree of the surrogate of Cattaraugus county, admitting to probate the will of Jonathan G. Rugg. (Reported below, 21 Hun, 383.)

The probate was contested on the ground that the will was not duly and properly executed, as required by the statute.

The facts appear sufficiently in the opinion.

W. Woodbury for appellants. The question to the subscribing witness whether, in his opinion, he was not mistaken was erroneously received. (54 How. 274; *Benway* v. *Johnson*, 5 Alb. Law Jour. 124; 66 Barb. 483; 1 E. D. Smith, 107; 10 Paige, 86; *Hogan* v. *Dillon*, 76 N. Y. 170; 18 Barb. 434; 17 Pick. 498; 7 Abb. 419; *People* v. *Mather*, 4 Wend. 229, 247,

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248, 249; 2 Hilt. 146; 1 E. D. Smith, 107; 6 Duer, 437; *Moody* v. *Rowell*, 3 Wash. C. C. 580.) It was error to allow the executor to testify to the execution of the will. (2 Hun, 654; 88 N. Y. 184; *Church* v. *Howard*, 79 id. 415, 419; 20 Barb. 245, 339; 8 Hun, 127; *Burrett* v. *Sillman*, 16 Barb. 198; *Lee* v. *Hill*, 39 id. 516; 12 Hun, 312; 17 id. 150; 15 id. 79; 51 N. Y. 624; 31 How. 372; 68 N. Y. 459; 1 Comst. 519; 69 N. Y. 256; 31 How. 372; 58 Barb. 625; 3 Cow. 621; 66 Barb. 577, 582.)

Allen & Thrasher for respondent. If the subscribing witnesses of a will are unable to recollect the attestation, then the execution may be proved by other witnesses and from surrounding circumstances, including the written attestation. (*Trustees of Auburn Seminary* v. *Calhoun*, 25 N. Y. 425; *Jauncey* v. *Thorne*, 2 Barb. Ch. 41; *Nelson* v. *McGiffert*, 3 id. 158; Willard on Executors, 109; *Thompson* v. *Leastedt*, 3 Hun, 395; *Cornwell* v. *Wooley*, 43 How. 475; *Morris* v. *Porter*, 52 id. 1; *Thompson* v. *Stevens*, 62 N. Y. 634; *Orser* v. *Orser*, 24 id. 51; *In the Matter of John Kellam's Will*, 52 id. 517.) The executor was a competent witness to prove the execution of the will, although not a subscribing witness, and his evidence was properly received by the surrogate. (*Will of Levy*, 1 Tucker, 87; *McDonough* v. *Laughlin*, 20 Barb. 239; *Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 387; *Pruyn* v. *Brinkerhoff*, 7 Abb. [N. S.] 401.) All the acts of the testator going to make up the execution of the will were done at the same time, and it is immaterial which act preceded the others if no material act or thing was omitted. (*Doe* v. *Roe*, 2 Barb. 200; *Sequine* v. *Sequine*, 21 Barb. 285; *Keeney* v. *Whitmarsh*, 16 id. 141; 54 id. 275; *Jackson* v. *Jackson*, 39 N. Y. 152.) It was proper to ask the subscribing witnesses if they were not mistaken as to the order in which the events testified by them happened. (*Cheeney* v. *Arnold*, 18 Barb. 435; *Budlong* v. *Van Nostrand*, 24 id. 25; *Seymour* v. *Bradfield*, 35 id. 49; *Weber* v. *Kingsland*, 8 Bosw. 416; *Black* v. *Camden, etc., R. R. Co.*, 45 Barb. 40.)

Opinion of the Court, per MILLER, J.

MILLER, J. We think that the evidence was sufficient to establish that the will was executed in accordance with the provisions of the Revised Statutes and the decisions of this court. The evidence of the subscribing witnesses upon the cross-examination, which, it is claimed, tended to show that they did not sign the will after it was signed by the testator, is insufficient to establish that it was not properly executed. Hooker, one of them, after stating that the testator signed after he did, appears to have had doubt on the subject, and testifies that he may be mistaken. The other witness, Smallwood, who testifies that he does not remember that Rugg signed last, states, in the course of his examination, that he (the witness) was the last one who signed. It will be seen that the testimony is by no means satisfactory that Rugg signed last, and the most which can be claimed from the evidence of the subscribing witnesses is that they were not positive — that they did not remember exactly how the fact was. To supply this want of memory Jenks, the executor, who had considerable experience in such matters, testifies distinctly as to all which took place, the order in which the several acts were done, and that the testator signed before the subscribing witnesses. The preponderance of proof was in favor of the due execution of the will, and, as the evidence stood, the surrogate could not come to any other conclusion than that the will was properly executed. Where there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attestation clause and the surrounding circumstances satisfactorily establish its execution. (*Matter of Kellum*, 52 N. Y. 517.) In fact wills may be established even in opposition to the evidence of the subscribing witnesses. (*Trustees of Auburn Theo. Sem.* v. *Calhoun*, 25 N. Y. 425.)

There was no objection to the questions put to the subscribing witnesses in regard to their being mistaken; and within well-settled rules they were properly allowed.

Jenks was also a competent witness. (See *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387.) There is no distinction

between this case and the one cited which authorizes a disregard of the latter authority.

No other question is presented which requires examination. Nor is there any thing in the evidence which authorizes a reversal of the decree of the surrogate. The opinion of the General Term fully covers all the questions presented, and the judgment should be affirmed.

All concur.

Judgment affirmed.

THOMAS CREGIN, Administrator, etc., Respondent, *v.* THE BROOKLYN CROSSTOWN RAILROAD COMPANY, Appellant.

The revival of an action does not necessarily carry with it the whole of the prior right of action.

Where a right of action for damages which can survive involves, mingled with, but separable from such damages, other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor.

Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury, survive to his personal representatives as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife, and the comforts of that society dies with him.

Upon revival of the action, therefore, only the damages that so survive are recoverable.

Cregin v. *Brooklyn Crosstown R. R. Co.* (19 Hun, 341), reversed.

(Argued January 17, 1881; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 8, 1879, affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 19 Hun, 341.)

The nature of the action and the material facts are set forth in the opinion.

Winchester Britton for appellant. Neither the society of a wife, nor the comfort which a husband may lose, by a negligent injury to her, survives to his administrator. (*Cregin* v. *Crosstown R. R. Co.*, 56 How. 465; 75 N. Y. 192–194; 25 Hun, 369; *George* v. *Van Horn*, 9 Barb. 523; *Howard* v. *Peck*, 50 id. 202; *Delamater* v. *Russell*, 4 How. Pr. 234; *North* v. *Turner*, 9 Serg. & Rawle, 244; *Grano* v. *Spier*, 58 Barb. 386; *McKee* v. *Judd*, 2 Kern. 625; Cooley on Torts, 226; *Fry* v. *Derstler*, 2 Yeates, 278; *Westlake* v. *Westlake*, 34 Ohio St. 21; *Clark* v. *Harlan*, 1 Cin. Sup. Ct. 418; Cooley on Torts, p. 227, note 3; *Lynch* v. *Knight*, 9 H. L. Cas. 577.) If in any event damages from loss of business services can be allowed, it must be under a complaint claiming it as special damage. (*Gilligan* v. *N. Y. & H. R. R. Co.*, 1 E. D. Smith, 453; *Jutte* v. *Hughes*, 40 N. Y. Supr. Ct. 126; 67 N. Y. 268; Hutchinson on Carriers, 796, 797.)

J. Warren Lawton for respondent. The comforts of the wife's society and services are inseparable from the natural and healthy relations of husband and wife, and are embraced within the statute which preserves from abatement by death, actions "for wrong done to the property, rights or interests of another." (2 Rev. Stat. 447, § 1; *Cregin* v. *Brooklyn Crosstown R. R. Co.*, 56 How. 466; 75 N. Y. 192.) The action having been revived, it was of necessity revived as an entirety. (*Wade* v. *Kalbfleisch*, 58 N. Y. 286; *Moore* v. *Hamilton*, 44 id. 666.)

FINCH, J. This action was originally brought by a husband for a wrongful injury to the person of his wife, whereby he suffered damages in the loss of her services and society, and in the expenses of such care and medical attendance as became necessary. Pending the action, but before trial, the husband died and the action was revived, his administrator being substituted as plaintiff. The question whether the cause of action survived came before us on appeal. (75 N. Y. 192.) Its answer involved a construction of the statute relating to suits by and against executors and administrators. (3 R. S. [6th ed.]

732, §§ 1 and 2.) We held that it preserved the right of action for tortious injuries affecting pecuniary rights or interests, and by which the estate of the deceased was diminished, excepting, of course, the wrongs referred to in section 2, and particularly named. We determined, also, that the injury to the wife, for which the intestate sued in his life-time, was such a wrong done to the rights and interests of the husband as would survive to his personal representatives, because it involved a pecuniary loss which diminished his estate; and that such result followed, notwithstanding the fact that the complaint also alleged as an element of damages, in addition to the loss of services, that of the "comfort" of his wife.

Upon the trial the court, in submitting the case to the jury, mingled these two classes of damage — those which involved pecuniary loss and diminished the estate, and those which only affected the personal comfort of the husband. After describing the cause of action which the wife had, the learned judge added, that "the other cause of action is the one before you which belongs to the husband, and which, in a prospective point of view, took in the fact that he was not only entitled to her services, and the *comfort of her society*, but was deprived of and suffered damages from it." Again, the measure of damages was described as affected by the death of the husband, and the court said: "The question which is before you stopped at his death, what he was deprived of in his life-time, the loss of her services *and society*, and you are limited to that and his expenses," etc. And, finally, after excluding from the consideration of the jury certain elements of special damage connected with her keeping a store, the learned judge added: "so that you will confine yourselves to what the husband suffered in respect to nursing, attendance, doctor's bill, the deprivation of ordinary affairs, of regular attendance, services, *comfort of his wife's society*, what the damage was." At the close of the charge the defendant's counsel excepted to so much of the charge as submitted to the jury the question of damages for the loss of society, and so much of it as related to "comfort" independent of services.

The attention of the court was thus called to the precise question, whether, in addition to the right of action for pecuniary damages which diminished the estate, there also survived to the administrator a right to recover damages for the loss to the intestate of the society of his wife, and the comfort of such society.

The conclusion of the court is sought to be sustained upon two grounds. The first is, that the charge, in the respect objected to, did not, in fact, go beyond a claim for services, and that what was intended by the use of the word "comfort" was merely the personal service of the wife as contradistinguished from the service of a stranger or a hired nurse. That is the substantial ground taken by the General Term. We do not think such a construction is just. It is not the natural or apparent import of the language, and could hardly have been so understood by the jury. How the defendant's counsel understood it was made very plain by the precise terms of the exception. Comfort, as independent of services, was the point of his objection, fairly and distinctly stated. It is not to be presumed that if he plainly misunderstood the meaning of the charge the court would have avoided explanation. If the counsel misunderstood it the jury might also, and indeed would, be very certain to do so when the interpretation, openly and distinctly put on it by the counsel, was in no manner qualified or repudiated by the court. We must understand, therefore, the charge to mean, as it plainly did mean, that a right to damages for the loss of the wife's society, and the comforts of that society, survived the death of the intestate and vested in the administrator.

The correctness of that ruling is argued on another ground. It is said that the cause of action which survives must do so as one and entire, and cannot survive in part and abate in part; and our attention is called to the cases of which *Moore* v. *Hamilton* (44 N. Y. 666) is a type. It was there said that when the action is revived the issue and proceedings are taken up at the point where death, marriage or other devolution of the party, as to whom the change is made, left them; that the

new or substituted party takes the place of the former one, and the case is revived and proceeds in all respects as if the new party had been in the case from the beginning. But this was said solely of the proceedings to enforce the right of action, and not of the right of action itself. The question to which the opinion was addressed was whether, by the revival of an action, a subsisting order of reference was vacated. Nothing was said to indicate that such revival carried with it, of necessity, the whole of a prior right of action. We think the elements of damage are easily separable. The intestate, in his life-time, may justly be said to have had one cause of action against the defendant, viz., for damages resulting to him from personal injuries wrongfully done to his wife; but while the cause of action was in one sense single, his right to damages therefor was compound, and consisted of several and diverse elements. The loss of his wife's services, the expenses necessarily incurred by reason of the injury, were a pecuniary loss, and diminished his estate, and so survived to his administrator; but the loss of his wife's society, and the comforts of that society, and the right of action for that, died with him. It cannot be said to have survived to his personal representatives because something else did. That would be to argue that because a cause of action survives in part, and as to some elements of damage suffered, its revival draws with it damages which died with the party. We said in this case, upon the question of the right of revival, that where the cause of action is not one of those enumerated in the statute, the character of the damages may control the question whether there is an injury to the property, rights or interests of the plaintiff; that is to say, that where an action is brought for the recovery of damages in the case referred to, wholly and entirely of such a character that they can survive to the personal representatives, the latter may recover them; where they are wholly of such a character that they cannot survive, and die with the party, there can be no revival, and the personal representatives cannot recover; but where a right of action for damages which can survive involves, mingled with it but separable from it, dam-

ages of such a character as die with the party, the revival of the action does not draw the latter with it and permit their recovery.

This rule was violated in the submission of the case to the jury, and for that error the judgment should be reversed.

All concur.

Judgment reversed.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME, WHICH ARE NOT REPORTED IN FULL.

SOLOMON LOEB et al., Respondents, *v.* THEODORE HELLMAN et al., Appellants.

The refusal of a trial court, to whom a case is submitted for determination, to find, upon a question of law involved, as requested by the defeated party, is not error requiring a reversal of the judgment here, although the request might well have been granted, if this court arrives at the same final conclusion as to the right of recovery.

As a general rule, and in the absence of an express agreement imposing a different liability, an agent engages simply for ordinary care and skill in the discharge of the duties of his agency, and is only liable to his principal for injuries resulting from a want thereof.

The liabilities, however, of the agent may be enlarged by express contract, and he may undertake to insure his principal.

(Argued September 27, 1880; decided November 30, 1880.)

THIS case was tried before a judge and jury. At the close of the proofs each party conceded that the evidence presented no disputed question of fact for the jury, and that it was only for the court to apply the law. Several requests were made by the defendants, conveying to the court their notion of the law of the case. None of these were acceded to by the court. The court here say, as to these requests, "one of them, perhaps more than one, might well have been. But the refusal so to do, as the case was submitted to the trial court, is not error calling for a reversal of the judgment, though we differ in opinion from the trial court in respect thereto, if we arrive at the same final conclusion, that the plaintiffs are entitled to recover."

The parties hereto entered into a contract, evidenced by letters passing between them, by which defendants agreed to purchase for plaintiffs, at New Orleans, foreign bills of exchange. It was claimed upon the part of plaintiffs, in substance, that the bills purchased should be accompanied and secured by valid bills of lading for shipments of cotton, and that each bill of lading was to be accompanied by a certificate of insurance, save where the cotton was insured abroad, in which case defendants were required to have proof of such insurance. Defendant purchased two bills which were not protected by any shipment of cotton, but which were accompanied by forged bills of lading. Defendants charged to plaintiffs the amount of these bills, and also charged the amount paid for insurance on a shipment of cotton, where they had purchased a bill of exchange without a certificate or proof of insurance. Acceptance of the two bills of exchange was refused. Plaintiffs claimed that they were improperly charged with the amount thereof, and also with the insurance. The principal controversy was as to the interpretation of the contract between the parties. The court here held that the language, viewed in the light of the surrounding circumstances, sustained the contention of the plaintiff. As to the general principles involved the court say:

"In the transactions involved in this action the general relation of the parties to each other was that of principal and agent. The defendants were appointed to do something, to wit: to buy bills of exchange for the plaintiffs, for and in the place of the plaintiffs; and the like of that makes an attorney in fact, or an agent. (Com. Dig., 'Attorney,' A.) It is a relation that is formed by contract, which may be in writing or by parol, or may be implied or inferred from circumstances. When the agency is thus implied or inferred, the duty or obligation that the agent takes upon himself is that which the law always declares, in the absence of express stipulation by the parties. It is, that the agent is understood to engage for reasonable skill and ordinary diligence, and is liable only for injuries to his principal growing from a want of that skill and from ordinary negligence. (*Leverick* v. *Meigs*, 1 Cow. 645; *Lawler* v. *Keaquick*, 1 Johns. Cas. 174.) And this is the rule,

because the relation constituted in such cases is generally one for the benefit of both parties. (Story on Bailments, § 23.) So, too, where the relation is formed by express contract, either written or in parol, the duty or obligation of the agent may be no greater; for the written or parol agreement may be so general in its terms as that the law will then declare the extent of the liability of the agent, or the contract may fitly square with the general rule of law and fix upon him no further obligation.

"In this case, however, we are not to determine or inquire whether or not the defendants had and put forth that skill and diligence, and were free from that negligence; for the trial court, in directing a verdict for the plaintiffs, declined to put the case, or to tell the jury to rest it, upon a consideration of that question.

"Though the law thus declares the rule, the contract of the parties may vary it, *conventio vincit legem.* The duty required by the law in general from a factor or agent may be narrowed by the covenant to a smaller compass than that which the bare employment would itself create. (*Shepherd* v. *Maidstone*, 10 Mod. 144.) And so it may be enlarged beyond that. Wharton defines an agency as a contract by which one person, with greater or less discretionary powers, undertakes to represent another in certain business relations. (Whart. on Agency, § 1.) *Del credere* is a term of mercantile law, used to denote the agreement which sometimes an agent or factor undertakes. He receives an additional compensation or commission, and, therefore, undertakes to insure to his principal the solvency of the purchaser. (*Morris* v. *Cleasby*, 4 M. & S. 574.) The mention of this just here is of use only as showing that an agent may specially agree for a greater liability than the law would impose upon an agency created in general terms. (And see *Shepherd* v. *Field*, 70 Ill. 438.)"

Francis Lynde Stetson for appellants.

John E. Parsons for respondents.

FOLGER, Ch. J., reads for affirmance.
All concur.
Judgment affirmed.

HENRY B. KINGHORN, as Receiver, etc., appellant, *v.* EDWARD WRIGHT et al., Respondents.

(Submitted November 12, 1880; decided December 1, 1880.)

THIS was an action to set aside a deed, as made to hinder, delay and defraud creditors. The trial court found against the plaintiff on the question of fraud; it was claimed on this appeal that this finding was not justified by the evidence. The court say: "We have examined the evidence sufficiently to ascertain that the fraud was not proved conclusively or by uncontradicted evidence. Therefore no question of law is presented and the judgment must be affirmed."

Horace E. Deming for appellant.

Jacob B. Miller for respondents.

RAPALLO, J., reads for affirmance.
All concur.
Judgment affirmed.

THE ST. NICHOLAS INSURANCE COMPANY, Respondent, *v.* THE MERCHANTS' MUTUAL FIRE AND MARINE INSURANCE COMPANY, Appellant.

(Argued November 17, 1880; decided December 1, 1880.)

THIS action was brought upon a policy of insurance issued by the defendant to the plaintiff, upon the barge *Berkshire*, which the plaintiff had previously insured. The plaintiff's policy was upon said barge, her tackle, etc., while used as a freight boat on the Hudson river, bay and harbor of New York, or while stopping at any of the ports or places on said waters, "for the sum of $4,000 for the term of one year from March 16, 1864." On the 7th day of March, 1865, the plaintiff issued a new policy upon the barge, by which an insurance was

made upon the same terms as in the first policy for $5,000 for the term of one year from March 16, 1865. The defendant issued its policy of reinsurance on the 28th day of February, 1865, upon the barge, which was described as "running on the Hudson and East rivers," for the sum of $2,000, loss, if any, payable *pro rata* with the reinsured; it was to expire on the 1st of September following, but was subsequently extended to the 16th day of March, 1866. On the 20th day of May, 1865, for an additional premium of $20.84, plaintiff indorsed on its policy the privilege to carry baled hay and straw, and country produce generally, and to burn kerosene oil for lights. This was unknown to defendant's officers until after the fire, which occurred in the month of November, 1865. The barge was used for carrying baled hay and straw after the privilege was granted.

The plaintiff received $50 originally as a premium on the policy of $5,000 issued by it, and afterward the $20.84 premium for the privilege to carry baled hay and straw, and country produce generally, and burn kerosene for lights. The defendant received $18.75 as a premium on the $2,000 for which its policy was issued. The evidence shows that there was an arrangement between the plaintiff and the defendant before the policies were issued, that the defendant was to receive the same rate of premium as the plaintiff did. It was also proved that it was the custom between insurance companies at the time, in case of reinsurance, to give and receive the same rate as the original insurer. The defendant had no knowledge of the receipt of the extra premium received by the plaintiff for the privilege to carry hay and straw, until after the fire, and it was then for the first time communicated to its attorney.

Defendant's policy contained a condition avoiding it in case of the use of the property insured for the storage of articles denominated hazardous, extra-hazardous, or especially hazardous. In the class of articles denominated extra-hazardous was "hay or straw pressed in bundles." *Held*, that defendant's policy was avoided by the carrying of pressed hay; and that this result followed whether said policy was to be regarded as a reinsurance of plaintiff's risk, because said risk was altered and increased by the permission so given, or whether the policy be

regarded as if it were an insurance issued to the owners of the barge, because then the condition as to pressed hay was violated.

George W. Parson for appellant.

William G. Cooke for respondent.

MILLER, J., reads for reversal and new trial.
All concur as stated in opinion.
Judgment reversed.

ARTHUR B. LONG et al., Respondents, *v.* EDWARD BUSSELL, impleaded, etc., Appellant.

(Argued November 18, 1880; decided December 7, 1880.)

S. R. Johnson for appellant.

Nelson Smith for respondents.

Agree to affirm without opinion.
All concur.
Judgment affirmed.

WELLINGTON R. BURT et al., Appellants, *v.* EDWARD C. SMITH, Respondent.

(Argued November 29, 1880 - decided December 7, 1880.)

DECIDED on the facts in the case.

John A. Mapes for appellants.

Herbert G. Hull for respondent.

FINCH, J., reads for affirmance.
All concur except RAPALLO, J., absent.
Judgment affirmed.

FREDERICK BEDFORD, as Executor, etc., Respondent, *v.* THOMAS C. FIELD et al., MILN P. PALMER, Purchaser, Appellant.

(Argued November 30, 1880; decided December 7, 1880.)

Edmund Coffin, Jr., for appellant.

Wm. Henry Arnoux for respondent.

AGREE to affirm without opinion.
All concur.
Order affirmed.

JOHN G. LOCKWOOD, Appellant, *v.* JOHN QUACKENBUSH et al., Respondents.

Where in the pleadings and upon the trial the plaintiff avers a cause of action *ex delicto*, he cannot in an appellate court abandon that claim and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered

(Argued November 18, 1880; decided December 7, 1880.)

THE summons in this action was for relief. The complaint alleged in substance that certain goods, the property of plaintiff, were by him intrusted to defendants as commission merchants, to be kept by them until instructed by plaintiff to sell; that they were instructed not to sell and to return the goods to plaintiff; that in violation of these instructions and without authority they sold the goods and converted them to their own use, and although a demand was made by plaintiff, they neglected and refused to comply therewith, and judgment was asked for the value of the goods. The case was tried upon the theory of an unwarranted and unratified disposition of the goods by defendants, and plaintiff's counsel asked the court to direct a verdict for him on the ground that the goods were sold and converted in violation of instructions; this was refused. The verdict was for the defendants. Upon the appeal plaintiff's counsel claimed the court should have directed a verdict for plaintiff for the amount of money in fact re-

ceived by defendants on sale of the goods as in an action *ex contractu*. *Held*, untenable. The court say:

"The pleadings and the whole course of the trial shut out the idea of an action *ex contractu*. The very reason given by the plaintiff, when he asked the court to direct a verdict for him, was that the goods were sold and converted in violation of instructions; and it is plain that the action was begun, and was prosecuted throughout, on the theory of an unwarranted and unratified disposition, by the defendants, of the property of the plaintiff. There have been cases in which, though some of the averments of the complaint have designated a cause of action in tort, there were other averments which could be taken as alleging a cause of action on contract, and where, at the trial, the plaintiff sought, upon ample evidence to that end, to rest his right to recover upon contract and breach thereof, the appellate court has sustained the action as one on contract. (*Conaughty* v. *Nichols*, 42 N. Y. 83.) We know of none where, in the pleadings and in the evidence and at the trial, the plaintiff has insisted upon a cause of action *ex delicto*, he has been allowed in the appellate court to abandon that claim and have a reversal of judgment, for that he might, had he sued on contract, have perchance recovered. We must reverse for error in the court below. Where it was not error to refuse a judgment on a cause of action *ex delicto*, we cannot reverse, because if a judgment had been asked *ex contractu*, it might properly have been rendered. In such case it is sufficient to say that the plaintiff did not present that alternative to the trial court; and by omitting so to do did not give the opportunity to the defendant of making any defense he might perhaps have, to an action based upon contract."

A stipulation was given by defendants' attorney, before the trial, which recited, that whereas the defendants were unable to produce, as required by order of the court, two letters written by plaintiff's agent in reference to the goods in question, the dates whereof were specified, therefore it was stipulated the plaintiff might produce copies thereof together with the affidavits of the agent of mailing, etc.; and that they should be received the same as if the facts were testified to on the trial by the agent, and that defendants would not controvert or deny the contents of the let-

ters. Copies of the letters, with the affidavit of the agent that he mailed them to defendants, were produced and received on the trial. One of the defendants, as a witness in their behalf, was asked if he received from the agent a letter of the date of one of those specified. This was objected to on the ground that the stipulation precluded defendants from showing that the letter was not received. *Held*, untenable; that the stipulation only precluded a denial that the letters were sent, that the recital therein that defendants were unable to produce the letters was not an admission that they once had them; and that defendants were at liberty to refute the presumption coming from the mailing of the letters by showing that they were not received.

L. L. Bundy for appellant.

J. H. Clute for respondents.

FOLGER, Ch. J., reads for affirmance.
All concur.
Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff in Error, *v.* JOSEPH BORK, Defendant in Error.

(Argued December 6, 1880; decided December 14, 1880.)

REPORTED below (16 Hun, 476).

J. M. Humphrey for plaintiff in error.

Wm. H. Gurney for defendant in error.

Agree to affirm without opinion.
All concur.
Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff in Error, *v.* ANNA COX, Defendant in Error.

(Submitted December 6, 1880; decided December 14, 1880.)

REPORTED below (21 Hun, 47).

Robert C. Titus, district attorney, for plaintiff in error.

Lewis & Rice for defendant in error.

AGREE to affirm without opinion.
All concur.
Judgment affirmed.

ERVING TAINTOR, Respondent, *v.* ISAAC D. HEMINGWAY et al., Appellants.

(Submitted December 6, 1880; decided December 14, 1880.)

REPORTED below (18 Hun, 458).

Warren & Kellogg for appellants.

Waters & Knox for respondent.

Agree to affirm on opinion below.
All concur.
Judgment affirmed.

ASAHEL B. AVERY, Respondent, *v.* VAN BUREN WHEAT et al., Appellants.

(Submitted December 6, 1880; decided December 14, 1880.)

DECIDED on the facts in the case.

John Callister for appellants.

E. W. Gardner for respondent.

Per curiam opinion for affirmance.
All concur.
Judgment affirmed.

MARGARETTA F. JOHNSON et al., Appellants, *v.* GODFREY HEISER, Respondent.

(Argued December 7, 1880; decided December 14, 1880.)

O. O. Cottle for appellants.

Wm. H. Gurney for respondents.

AGREE to affirm on opinion of BECKWITH, J., in court below.

All concur.

Judgment affirmed.

MARY E. PATTON, Appellant, *v.* LEONARD H. GILES, Survivor, etc., Respondent.

(Argued December 7, 1880; decided December 14, 1880.)

William B. French for appellant.

Edgar L. Furzman for respondent.

Agree to affirm without opinion.
All concur.
Judgment affirmed.

CHAUNCEY STEVENS, Respondent, *v.* OLIVER GLOVER, Appellant.

For the purposes of a motion to dismiss, an appeal is to be regarded as pending where notice of appeal was duly served and undertaking given, and the appellant has not abandoned the appeal.

An order of General Term refusing to open a default is not appealable.

So, also, a judgment of affirmance by default of the General Term is not reviewable here.

(Argued December 7, 1880; decided December 21, 1880.)

THESE were motions to dismiss two appeals; the one from a judgment of General Term, affirming by default a judgment in favor of plaintiff, the other from an order of the General Term, refusing to open the default. *Held*, as above.

E. Countryman for motion.

N. C. Moak opposed.

Per curiam opinion for dismissal of appeals.
All concur.
Appeals dismissed.

MORITZ JOSEPHTHAL et al., Appellants, *v.* JOHN C. STEFFEN et al., Respondents.

(Argued September 28, 1880; decided December 21, 1880.

Seig. Spingarn for appellants.

M. L. Townsend for respondents.

Agree to reverse order of General and affirm judgment of Special Term, without opinion.

All concur, except MILLER, DANFORTH and FINCH, JJ., dissenting; DANFORTH, J., writing dissenting opinion.

Order reversed and judgment affirmed.

In the Matter of the petition of DANIEL R. KENDALL, to Vacate an Assessment.

(Argued November 30, 1880; decided December 21, 1880.)

THIS was an appeal from an order of General Term, affirm-

ing an order of Special Term vacating an assessment for under-ground drains.

The facts were similar to those in *In re Cheesebrough* (78 N. Y. 232); and the case was decided upon the authority of that case and of *In re Van Buren* (79 N. Y. 384).

William C. Whitney for appellant.

Alexander B. Johnson for respondent.

FOLGER, Ch. J., read for affirmance.
All concur, except MILLER, J., not voting.
Order affirmed.

PHŒNIX INSURANCE COMPANY OF BROOKLYN, Respondent, *v.* WILLIAM FLOYD et al., Appellants.

(Argued December 8, 1880; decided December 21, 1880.)

REPORTED below (19 Hun, 287).

F. P. Bellamy for appellants.

D. P. Barnard for respondent.

Agree to affirm, without opinion.
All concur.
Judgment affirmed.

HENRY WIGGINS et al. *v.* CLARISSA R. HOWARD et al.

JULIA A. SCHENCK, Appellant, *v.* JAMES F. PIERCE, Referee, Respondent.

(Argued December 14, 1880; decided January 18, 1881.)

THE action which is first above entitled was for the partition and sale of certain real estate, situate in Kings county. Judg-

ment was rendered on the 19th day of May, 1868, and James F. Pierce was thereby appointed referee, to make the sale and report the same to the court, and, if his report should be confirmed, execute deeds to the purchasers, on their complying with the terms of sale. The sale was made July 8, 1868, and produced the sum of $214,610. It was paid, part in money and part in bonds and mortgages. A report made by the referee, in pursuance of the judgment, was confirmed on the 7th of September, 1868, and at the same time the referee was directed to execute conveyances to the several purchasers, and, after paying costs and allowances to the various attorneys, divide the residue of the proceeds among certain parties entitled thereto, and provide for the dower interest and life estate of Susan Posten, by paying a requisite amount to the treasurer of the county of Kings. The sum necessary for this purpose was estimated at $30,621.61. The interest accruing thereon was for Susan Posten during her life, and at her death the principal was to be paid over to Julia A. Howard.

The complaint made against the referee is that he did not pay to the treasurer $13,780.11, part of the sum of $30,621.61, above referred to, and in November, 1878, a motion was made in behalf of Susan Posten and the said Julia for an order directing the referee to make this payment, and thereafter to file his report, with vouchers and receipts, for all moneys paid by him out of the proceeds of sale in the action. The referee made a report dated December 14, 1878, showing compliance with the judgment of partition and the subsequent order made thereon, and also the payment to the county treasurer by the transfer of certain bonds and mortgages amounting to $16,841.50 and $13,780.11, in a bond and mortgage of Philip S. Crooke and wife. These were for the dower interest and life estate aforesaid, and the controversy relates only to the last item. The real question litigated was whether the Crooke bond and mortgage should be allowed to the referee, or whether he should be required to pay to the moving parties the amount of money represented by it. This report and affidavits on both sides were brought before the court upon the hearing of the motion above referred to, and on the 3d of June, 1879, the matter embraced by such motion, report and

affidavits were sent to referee Heaton, to take testimony in respect to the facts in issue, "so that the court may ascertain the truth in respect thereto," and for that purpose the referee was required to report the testimony so taken, with his opinion. This was done. As a conclusion from the testimony, the referee was of opinion that the beneficiaries, Susan and Julia, had the right to repudiate the Crooke mortgage, and that referee Pierce should pay to the county treasurer the sum represented thereby, with interest, and that the bond and mortgage be assigned and delivered up to him. Pierce excepted to this report in various particulars; and in March, 1880, the whole proceedings, including the testimony taken before the referee, his report, the exceptions thereto, and the original affidavits, were brought before the court, at Special Term, by a motion in behalf of Susan and Julia, for confirmation of the report of referee Heaton, and for an order directing Mr. Pierce to pay over the sum of $13,780.11, with interest as stated in Mr. Heaton's report. The Special Term denied the motion, refused to confirm the report of referee Heaton, and directed that the report of referee Pierce stand as filed. Susan and Julia appealed to the General Term, where the action of the Special Term was approved and its order affirmed. From the order there made this appeal was brought. It appears from the petition on which the motion was founded, that Susan and Julia appeared in the partition suit, by Mr. Clement as their attorney, but Mr. Philip S. Crooke was, as was stated in their behalf, "their actual attorney and counsel," and both of these gentlemen attended to closing the sale and collecting the moneys and mortgages for the referee. On the 25th of November, 1873, there were in Mr. Crooke's hands, products of the sale, money, $13,780.11 and bonds and mortgages, amounting to $16,841.50. He deposited those with the county treasurer, and at the same time delivered to the treasurer his own (Mr. Crooke's) bond and mortgage for $13,780.11, for the purpose mentioned in the receipt then given to him by the county treasurer, in these words: (Title of the cause.) "Brooklyn, November 28th, 1873. Received pursuant to decree herein, dated May 19, 1868, from James F.

Pierce, Esq., as the life estate of said Susan Posten, and her dower right, to be invested for the benefit of Susan Posten ; the interests or dividends therein, or to accrue thereon, to be paid over to her during her natural life, the following bonds and mortgages, amounting to $30,621.61;" then follows an enumeration of various small mortgages, amounting to $16,841.50, and after that this statement: "$13,780.11, balance invested in bond and mortgage of Philip S. Crooke and wife." Signed Thos. A. Gardiner, county treasurer. There was no evidence to show, and no allegation, that these instruments were not at that time good security for the amount named. Prior to 1873, Julia had intermarried with Abraham V. Schenck, and on the 24th of November, an agreement was entered into between Mrs. Susan Posten of the first, Mrs. Julia A. Schenck (formerly Julia A. Howard), of the second, and Abraham V. Schenck of the third part, by which after referring to the partition suit, and the fund above referred to as in the hands of the county treasurer, the parties agree that the judgment in partition shall be modified, and Susan and Julia "transfer to Abraham the said fund of $30,621.61, in trust, to invest, collect and reinvest, and pay over the interest to Susan during her life, and after her death to Julia, her heirs, representatives, or assigns." And Abraham accepted the same. Subsequently a petition was presented to the Supreme Court by Mr. Schenck, in which he recited substantially the facts stated in the agreement and asked for "an order directing the county treasurer of Kings county to assign" to him, "trustee as aforesaid, the said bonds and mortgages." A reference was ordered to take proof of the facts stated in the petition, and the referee reported, finding the facts in respect to the partition suit, and the interest of Susan and Julia therein, as above-stated; the intermarriage of Julia with Abraham V. Schenck; that the fund "now amounts to $30,691.61, and is now invested in securities in the hands of the county treasurer," and the agreement above stated. Accompanying this report was, among other things, a copy of the judgment in partition; the certificate of the deputy county treasurer, describing the fund in his hands, substantially as in the receipt of the treasurer, giving in detail the names of the mortgagors, the amount

of each mortgage, and among others, Philip S. Crooke, $13,780.11. Upon this report the prayer of the petitioner was granted, and the county treasurer was ordered to assign the bonds and mortgages, describing them, to the trustee; on the 5th of December, 1873, they were delivered to him, and he gave a receipt therefor, describing each one. In June, 1875, the trustee had the title to the lands described in the Crooke mortgage examined by his counsel, Mr. Baker, and in September, 1876, he extended the time of its payment for two years. On the 18th of March, 1878, Mr. Schenck resigned his position as trustee, and transferred the trust estate to Julia A. Schenck, his wife (formerly Julia A. Howard), and she was appointed trustee in his stead. Since the assignment by the county treasurer December 5, 1873, Mr. Schenck, and afterward Mrs. Schenck have collected interest on the bond, as the referee finds, "up to and since these proceedings were commenced," November 18, 1878. *Held*, that the motion was properly denied.

The court say: "There seems to have been no default in payment, no inadequacy of security, and no reason for this attempt to charge the referee, except his omission to obey the letter of the judgment. If he had paid the money to the county treasurer, it would have been his duty to invest it upon bond and mortgage. It is claimed by the respondent that by the arrangement between Mr. Crooke and the county treasurer, the bond and mortgage was regarded by the latter as such an investment, but whether it was or not, there is nothing in the case to impute bad faith to the referee in this transaction. He might have deposited with the treasurer mortgages taken for sixty or seventy-five per cent of the purchase-price of lands sold, and whether he paid the money, or transferred mortgages, it does not appear that the condition of the appellants would have been better, nor does it appear that they have been prejudiced by the course taken by the referee. The purpose of the decree was to set apart a fund, not merely as a deposit, but to be invested, so that an income should accrue during Mrs. Posten's life, and so that at her death the principal should be secure for Julia. This was accomplished, and the

complaint and ground of this application is that it was not done in the precise mode indicated by the original judgment. That mode, however, was for the benefit of the parties to this proceeding. The change made seems to have had their approbation, and the sanction of the court. It cannot now be rejected, and a strict compliance with the decree insisted upon.

The appellants have had at all times legal and independent advice; they have had every opportunity of knowing all the facts connected with the transaction involved in this inquiry; they have by their trustee required the interposition of the court to modify the original judgment, for their benefit, enjoyed for many years, and are still receiving, for aught that appears, the interest upon the security, and for their own interest, or the accommodation of Mr. Crooke, postponed payment of the principal sum. No good cause is shown why they should, against the will of the referee, repudiate the investment, and impose it upon him."

Morris & Pearsall for appellants.

Edgar M. Cullen for respondents.

DANFORTH, J., reads for affirmance.
All concur.
Order affirmed.

DANIEL W. FORD, Respondent, *v.* THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK, Appellant.

(Argued December 17, 1880; decided January 18, 1881.)

S. G. Clarke for appellant.

Esek Cowen for respondent.

Agree to affirm without opinion.
All concur.
Judgment affirmed.

CHARLES C. LOCKWOOD, Appellant, *v.* ELIZABETH S. UNDERWOOD, Respondent.

(Argued December 17, 1880; decided January 18, 1881.)

David Miller for appellant.

Agree to reverse order and affirm judgment on report of referee, without opinion.

All concur.

Order reversed and judgment affirmed.

ALEXANDER HENRY, Respondent, *v.* JOHN BRADY, Appellant.

(Argued December 21, 1880; decided January 18, 1881.)

DECIDED on the facts.

James L. Bishop for appellant.

N. A. McBride for respondent.

FINCH, J., reads for affirmance.
All concur.
Judgment affirmed.

HENRY J. JOHNSON et al., Appellants, *v.* GROVE & BAILEY, Respondents.

(Argued December 22, 1880; decided January 18, 1881.)

DECIDED on the facts.

J. Hampden Dougherty for appellants.

J. Thomas Spriggs for respondents.

ANDREWS, J., reads for affirmance.
All concur.
Judgment affirmed.

MARY BYRNE, an Infant, etc., Appellant, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD CO., Respondent.

An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age.

(Argued December 22, 1880; decided January 18, 1881.)

This action was brought by the plaintiff to recover for injuries received at a railroad crossing on defendant's road, through the alleged negligence of defendant. The accident occurred in April, 1870, when the plaintiff was between ten and eleven years old. She was approaching the railroad from the east, and was struck by the rear end of a train backing northerly, while attempting to cross the railroad track upon a street-crossing in the city of Troy.

There was evidence tending to show that the train was backing at the rate of eight miles per hour, without giving any warning to persons who might lawfully be upon the railroad track.

It is not claimed that there was any negligence on the part of the parents of the plaintiff in permitting her to go upon the street unattended. Her mother sent her upon an errand which required her to cross the railroad, and warned her of the danger at the crossing, telling her to look both ways before crossing. She testified that she looked both ways as she approached the railroad and did not see the train until it was too late for her to escape. It was claimed on the part of defendant that it was not possible that she took the precaution to look both ways, because, if she had, she would have seen the approaching train in time to escape danger, and this claim was based upon measurements. The accident took place at a point about one hundred and seventy feet northerly of Madison street and about six hundred and seventy feet northerly of Monroe street. When the plaintiff was thirteen feet from the easterly track she could see southerly upon the track one hundred feet. When six feet from that track she could see southerly about two hundred and seventy feet and when she came to the rail of that track she could see southerly several

hundred feet — nearly to Monroe street; and hence it was argued that if she had looked southerly she must have seen the train in time to escape. Plaintiff was nonsuited. The court here say: "This argument is not entirely conclusive. At the rate of eight miles per hour this train, at the time of the accident, approached the plaintiff at the rate of seven hundred feet per minute, and passed one hundred feet in less than nine seconds. Therefore it may well be that if the plaintiff looked when she was thirteen or more feet from the track, leisurely walking, the train was not in sight, and not seen. It does not appear how far she could have seen at any point between thirteen and six feet from the track. At six feet from the track she could have seen about two hundred and seventy feet southerly, and the train passed over that distance in about twenty-three seconds; so that if, at the distance of six feet from the track, she had looked to the south, the train might not have been in sight and she might not have seen it. But if she had looked southerly while passing the last six feet of the easterly rail she would undoubtedly have seen the train; and probably the utmost caution would have required this. But she was required to look both ways. She did not know from which direction danger was to be apprehended. She may have looked southerly twice, as she testified she did, but during the last six feet — only three or four steps — she may have been looking in the other direction, or north-westerly in the direction in which she was going. It may be that this evidence would show the want of that care which the law would exact of an adult. But does it show the want of that care which is demanded of an infant of plaintiff's age? She cannot be supposed to have had that knowledge of the speed of trains and the importance of looking again, just before taking the step upon the track, which an adult would have. The law is not so unreasonable as to exact from an infant the same degree of care and prudence in the presence of danger as it exacts from adults. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age. (*Sheridan* v. *Brooklyn & N. R. R.*, 36 N. Y. 42; *O'Mara* v. *H. R. R. R. Co.*, 38 id. 445; *Mowrey* v. *Central City Railway*, 51 id. 666;

Reynolds v. *N. Y. C. & H. R. R. R. Co.*, 58 id. 252; *Thurber* v. *Harlem, B., M. & F. R. R. Co.*, 60 id. 336; *McGarry* v. *Loomis*, 63 id. 107; *Fallon* v. *Central Park, N. & E. R. R. R. Co.*, 64 id. 13; *McGovern* v. *N. Y. C. & H. R. R. R. Co.*, 67 id. 417; *Haycroft* v. *Lake Shore & M. S. R. R. Co.*, 2 Hun, 491; *S. C.*, 64 N. Y. 636; *Casey* v. *N. Y. C. & H. R. R. R. Co.*, 78 id. 518.)

"We cannot within these authorities, upon the undisputed facts, say, as matter of law, that the plaintiff — regard being had to her tender years — failed in that degree of care which the law required of her. Whether she did or not was, upon all the circumstances of this case, a question for the jury."

R. A. Parmenter for appellant.

Esek Cowen for respondent.

EARL, J., reads for reversal and new trial.

All concur, except FOLGER, Ch. J., and RAPALLO, J., who dissent.

Judgment reversed.

ADDISON C. JACKSON, Administrator, etc., Appellant, *v.* WILLIAM B. TUELL, Respondent.

(Argued January 18, 1881; decided January 25, 1881.)

THIS was a motion to dismiss appeal because of failure to file proper undertakings.

A. B. Crane for motion.

G. S. P. Stillman opposed.

Per curiam mem. for granting motion, unless appellant, within twenty days from service of copy order, perfects his appeal by the filing and service of a due and proper undertaking, pays $10 costs, in which event motion denied.

All concur.

Ordered accordingly.

JOHN T. BON, Respondent, *v.* EDWARD R. SANFORD et al., Appellants.

(Submitted January 18, 1881; decided January 25, 1881.)

Ruger, Jenney, Brooks & French for appellants.

Hiscock, Gifford & Doheney for respondent.

Agree to affirm without ovinion.
All concur.
Order affirmed.

JOSEPHINE SAHLER, Respondent, *v.* FRANK E. WILLIAMS, Appellant.

(Argued January 18, 1881; decided January 25, 1881.)

H. L. Comstock for appellant.

W. H. Adams for respondent.

Agree to affirm without opinion.
All concur.
Order affirmed.

CHARLES PARDEE, Respondent, *v.* DAVID TILTON et al., Appellants.

(Argued January 18, 1881; decided January 25, 1881.)

PLAINTIFF obtained judgment in this action, the venue in which was laid, and judgment-roll filed, in Onondaga county. The defendants resided in the city of New York. In supplementary proceedings an order was granted by a justice of the fifth judicial district, appointing a referee, residing in the city of New York, to take the examination of the defendants, and

directing all further proceedings to be had before Judge DONOHUE in the first judicial district. The defendants failed to appear before the referee as required by the order. An order was thereupon granted by Judge DONOHUE, requiring defendants to show cause why they should not be punished as for contempt. On the return day defendants appeared by counsel. The judge made an order substituting another referee in place of the one named in the original order, and directing the defendants to appear and answer before said referee at a time stated, and directing the contempt proceedings to stand over until after such examination. To review this order this appeal was brought.

The court say: "Judge DONOHUE had power to make the order appealed from. Whether he should exercise this power rested in his discretion, and the order is not, therefore, reviewable here."

Samuel J. Crooks for appellants.

Edward T. Bartlett for respondent.

Per curiam opinion for dismissal of appeal.
All concur.
Appeal dismissed.

CAROLINE J. LIEGEOIS, Respondent, *v.* JOHN MCCRACKAN, Appellant.

(Argued January 18, 1881; decided January 25, 1881.)

REPORTED below (22 Hun, 69).

Nathaniel C. Moak for appellant.

Francis Fellows for respondent.

Agree to dismiss appeal without opinion.
All concur.
Appeal dismissed.

OSCAR TAYLOR, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued December 21, 1880; decided January 25, 1881.)

THIS action was brought to recover a balance alleged to be due plaintiff on a contract for work in constructing certain sewers. The answer set up a counter-claim for damages for breach of contract. The contract contained a clause authorizing defendant, in case of failure on the part of plaintiff to complete the work, to go on and complete it and charge the expense of completion to plaintiff. Plaintiff having failed to complete the contract, defendant under this clause contracted for its completion with one Hackett; the latter also failed to perform his contract, and the work was again let to one McGinn. Upon the trial defendant's counsel asked one Myers, a city employee, if he could tell the amount incurred in the final completion of the work in excess of the plaintiff's contract. This was objected to on the ground that the cost of the work should be measured by what Mr. Hackett agreed to do it for. The objection was sustained. The defendant then without objection proved by the witness that under the Hackett contract the work would cost in excess of the prices under plaintiff's contract more than the balance unpaid for the work done by him. The referee found that defendant had failed to prove the counter-claim and gave judgment for the balance claimed. *Held*, that while defendant might have claimed that plaintiff upon refusing to do the work he was by his contract bound to do, forfeited his contract, yet as it did not take that position, but rested upon the clause in the contract above mentioned, it could not now insist that the contract was forfeited. (*Murphy* v. *Buckman*, 66 N. Y. 297.) But that this did not preclude defendant from a counter-claim to the extent of the cost of completing the work according to plaintiff's contract, and that defendant having accepted the test insisted upon by plaintiff as the true measure of damages, and having confined itself to that measure and given testimony upon it without objection, competent and sufficient to establish the counter-claim, the finding of the referee was error.

It was claimed upon the argument of the appeal that the form of the proposals under which Hackett took his contract would enhance the price of doing the work. It did not appear that this position was taken on the trial. *Held*, that as the defendant gave proof from which the court could have found with exactness the cost of finishing the work and how much it was under the Hackett contract in excess of plaintiff's, if there was any thing in those proofs which was inexact in fact it was for plaintiff to have furnished the correction.

Riggs v. *Pursell* (74 N. Y. 374), distinguished in that in that case it was an express condition of the sale, that if a resale was had it should be on the same terms, and the terms of the resale there were so variant as to make the subject-matter a different thing, and gave no just measure of liability, while here the plaintiff's contract did not so limit defendant, and the two contracts with the proofs did furnish data for an exact result in figures of the cost of completion to be charged to plaintiff. Which data, if incorrect, plaintiff had the means to correct.

Thomas G. Hillhouse for appellant.

D. J. Dean for respondents.

Per curiam opinion for affirmance of order and for judgment absolute against plaintiff.

All concur.

Order affirmed and judgment accordingly.

CHARLES STUART HALE, Executor, etc., Appellant, *v.* WILLIAM MOFFAT, Respondent.

(Argued January 17, 1881; decided January 25, 1881.)

N. Morey for appellant.

Joel L. Walker for respondent.

Agree to affirm without opinion.

All concur.

Judgment affirmed.

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ABATEMENT AND REVIVAL.

1. The revival of an action does not necessarily carry with it the whole of the prior right of action. *Cregin* v. *B'klyn C. T. R. R. Co.* 595

2. Where a right of action for damages which can survive involves, mingled with, but separable from, such damages, other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor. *Id.*

3. Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury survive to his personal representatives as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife, and the comforts of that society dies with him. *Id.*

4. Upon revival of the action, therefore, only the damages that so survive are recoverable. *Id.*

ABORTION.

An indictment under the statute providing for the punishment of any person who "shall administer to any *pregnant woman*" any medicine, etc., to cause a miscarriage, is sufficient, where instead of using the words "pregnant woman" it charges the offense to have been committed upon "a woman with child." *Eckhardt* v. *People.* 462

ACTION.

1. The fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as one *ex delicto*. *Sparman* v. *Keim.* 245

2. Where in the pleadings and upon the trial the plaintiff avers a cause of action *ex delicto*, he cannot in an appellate court abandon that claim and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered. *Lockwood* v. *Quackenbush.* 607

—— *An action is not maintainable against a department of a city government; the remedy is by mandamus, not by action.*

See Swift v. *Mayor, etc.* 528

ACTS OF CONGRESS.

1. Proceedings under the confiscation acts of Congress, while in the nature of proceedings *in rem*, operate only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture does not divest or affect the title of third persons originating prior to the seizure, or of the real owner not proceeded against. *Risley* v. *Phenix Bk.* 318

2. The confiscation acts do not con-

template or authorize the confiscation of the property of a corporation. *Id.*

ADMISSIONS AND DECLARATIONS.

The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will. *Williams* v. *Freeman.* 561

—— *When admissions of treasurer of a corporation not competent in action against a trustee to recover a debt because of failure to file annual report.*

See Alexander v. *Cauldwell.* 480

AMENDMENT.

In an action upon a contract the General Term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial. (Code of Civil Procedure, § 723.) *Harris* v. *Tumbridge.* 92

APPEAL.

1. When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit. *Painton* v. *No. Cent. R. Co.* 7

2. In an action upon a contract the General Term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial. (Code of Civil Procedure, § 723.) *Harris* v. *Tumbridge.* 92

3. When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order. *Veeder* v. *Baker.* 163

4. *It seems* that the motion should be made in the Supreme Court. *Id.*

5. This action was brought to recover freight agreed to be paid for transporting 200 barrels of beans on the deck of a canal boat to New York. Defendant's answer admitted the agreement to pay the freight and the transportation, but alleged that, through the negligence of the plaintiff, the beans were wet and damaged, and asked judgment for the damages, less the freight. At the close of the trial defendants' counsel submitted certain propositions of fact and law, "each and every" of which he requested the referee to find as stated. The conclusions of law were: 1st. That plaintiff was "entitled to recover" the amounts claimed for freight; 2d. That defendants were "entitled to recover" a sum specified for their damages; 3d. That defendants were "entitled to judgment" for the balance. The referee found the first proposition, but refused to find the other two; to the refusal to find defendants' counsel excepted, but did not except to the finding. The General Term, on appeal, *held*, that the finding, in accordance with the request and the omission to except thereto, entitled plaintiff to maintain his judgment. *Held*, error; that the three propositions so submitted should have been taken together and construed as one sentence, and so taken, the request was that defendants have judgment upon the adjustment of the two claims, for the difference between them; and that, therefore, defendants were entitled to a review of the refusals to find and the referee's conclusions of law. *Schwinger* v. *Raymond.* 192

6. Notwithstanding the provision of the Code of Civil Procedure (§ 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in

his notice of argument, and the grounds of the preference, etc. *Taylor* v. *Wing*. 527

7. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. *Briggs* v. *Waldron*. 582

8. The refusal of a trial court, to whom a case is submitted for determination, to find, upon a question of law involved, as requested by the defeated party, is not error requiring a reversal of the judgment here, although the request might well have been granted, if this court arrives at the same final conclusion as to the right of recovery. *Loeb* v. *Hellman*. 601

9. Where in the pleadings and upon the trial the plaintiff avers a cause of action *ex delicto*, he cannot in an appellate court abandon that claim and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered. *Lockwood* v. *Quackenbush*. 607

10. For the purposes of a motion to dismiss, an appeal is to be regarded as pending where notice of appeal was duly served and undertaking given, and the appellant has not abandoned the appeal. *Stevens* v. *Glover*. 611

11. An order of General Term refusing to open a default is not appealable. *Id.*

12. So, also, a judgment of affirmance by default of the General Term is not reviewable here. *Id.*

——*Where order in supplementary proceedings made in district where venue was laid and roll filed appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides, such justice has power to change referees and the exercise of this power is discretionary and not reviewable here.*

See Pardee v. *Tilton* (*Mem.*). 623

APPLICATION OF PAYMENTS.

1. *It seems*, that the right of a debtor making a payment to direct upon which one of several distinct liabilities or demands, held by his creditor, it shall be applied, must be exercised at the time of payment; if he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the creditor and he may apply it as he chooses. *Nat. Bk. of N.* v. *Bigler*. 51

2. So, where the debtor assigns property as collateral security generally without dictating upon what demand its proceeds shall be applied, he cannot bind the creditor by any subsequent direction, but the latter may apply such proceeds to any of the demands held by him which are due at the time the money is received. *Id.*

3. Where money is collected by a creditor by the sale of collaterals placed in his hands to secure several distinct items of indebtedness, under such circumstances that neither he nor the debtor possesses the right to determine as to the application, the power devolves upon the court, and it will apply the money upon equitable principles. *Jones* v. *Benedict*. 79

4. W. H. held certain notes and a mortgage as security for an indebtedness of W. F.; the latter was dealing with and was indebted also to F., B. & Co. To secure any balance which might, at any time, be due from W. F. to that firm, W. H. transferred to them said securities, the same to be returned to him when such balance was paid; afterward W. H. drew drafts upon F., B. & Co. for the benefit of a mining corporation, in which he had no interest, but in which W. F. and the plaintiff were stockholders, W. F. being its superintendent; these drafts were accepted by said firm upon an agreement that the notes and mortgages should be held as security therefor; and, not having been paid at maturity, were taken up by the

firm. To procure an extension of the time of payment W. F. executed his notes, payable to his order, which were indorsed by him, by plaintiff and by other stockholders, and were delivered to F., B. & Co. The stockholders, including plaintiff and W. F., subsequently executed an agreement by which each obligated himself to pay his proportionate share of liabilities assumed for the benefit of the corporation. F., B. & Co. recovered judgment upon the stockholders' notes, and subsequently collected, upon the mortgage, a sum sufficient nearly to pay the balance due them from W. F. In an action brought for relief against said judgment, plaintiff claiming that the sum so collected should be applied *pro rata* upon the debts for which the mortgage was held as security, *held*, that whether the application of the money devolved upon the creditor or the court, equity justified its application upon the balance due from W. F. *Id.*

ASSESSMENT AND TAXATION.

1. Where an assessment is not only unconstitutional and void, but has been so judicially declared and the invalidity is such that it must appear upon the proof necessary to be made to sustain proceedings under it, it is not essential to the maintenance of an action to recover back moneys collected under the assessment that it should first be judicially vacated. *Horn* v. *Town of New Lots.* 100

2. Plaintiff's complaint alleged in substance that there was a sum of money belonging to her in the official custody of the county clerk of K. county, the same being the surplus arising upon the foreclosure of a mortgage upon certain lands belonging to her in the town of N. L.; that an assessment for a local improvement had been in form laid upon said lands in pursuance of certain statutes which were unconstitutional and void and the assessment invalid; that a tax was levied upon the premises to pay such assessment and a warrant issued to the collector of said town, who, by virtue thereof, levied upon and took said money from the county clerk and paid it to the county treasurer to the credit of the town; that bonds of the town had been issued to provide for payment of the expenses of said improvement, which were valid obligations of the town, and the money so paid was applied to the payment of said bonds, and that said town had wrongfully taken and received said money, without the knowledge or consent of the plaintiff, and applied it to its own use, and had failed and neglected to pay over the same. *Held*, that the complaint set forth a good cause of action against the town, and that a demurrer thereto was improperly sustained. *Id.*

3. The published notice inviting bids for a local improvement in the city of New York contained a provision that the bidders should state in their proposals the price per cubic yard for rock excavations, and one-fourth the price bid would be allowed as the price for earth excavations; the notice contained the estimated quantities of work to be done. *Held*, that in the absence of allegations or proof that the provision was fraudulently inserted or that it in fact did any harm, this was not a violation of the provisions of the charter of 1870 (§ 104, chap. 137, Laws of 1870), requiring contracts for such work to be let to the lowest bidder. *In re Marsh.* 431

4. A bid a little lower than the one accepted, tested by the estimated quantities, was rejected because of failure to conform to this specification, the bid for earth excavation being slightly in excess of one-fourth of that paid for rock excavation. *Held*, that the commissioner of public works having authority to insert the specification could require a literal and exact compliance therewith, and could reject as informal all bids not so complying, and a letting to the lowest bidder who did so comply was valid. *Id.*

5. It appeared that the bid accepted, tested by the actual quantities as found in the prosecution of the work and as paid for, was the lowest. *Held*, that the error, if any, in not awarding the contract to the apparent lowest bidder was not a substantial one within the meaning of the statute of 1874, relating to the vacating of assessments (chaps. 312, 313, Laws of 1874); and that one whose lands were assessed for the improvement was not aggrieved thereby; and, therefore, was not entitled to have the assessment vacated. *Id.*

6. The power conferred upon the commissioners of Central park by the act of 1867 (§ 1, chap. 697, Laws of 1867) to change the grade of any of the streets within a district therein specified, in the city of New York, was not subject to, or limited by, the provision of the act of 1852 (§ 2, chap. 52, Laws of 1852), prohibiting the common council of said city from changing the grade of streets without the written consent of the owners of two-thirds, in lineal feet, of the adjoining lands. *In re Walter.* 538

7. Accordingly, *held*, that an assessment for a change in the grade of a street, made by said commissioners under said act of 1867, was not invalidated because of failure to obtain such consent. *Id.*

8. Prior to the passage of the New York city charter of 1873 (chap. 335, Laws of 1873), under the provisions of the act of 1871 (§ 1, chap. 226, Laws of 1871), changing the grade of a portion of Ninth avenue, and directing the commissioner of public works to proceed forthwith in such manner as should be deemed necessary and proper to regulate and grade said avenue, according to the grade so fixed, certain maps were filed; one of the streets intersecting Ninth avenue, the grade of which by said act of 1871 (§§ 2–4), the said commissioner was authorized to change so as to conform to the grade of Eighth avenue, on which map new grades of Ninth avenue appeared; another, a map or profile of the new grade of Ninth avenue. No work, however, had been done upon said avenue, in changing the grade, prior to the passage of the charter, and no contract had been made for such work. *Held*, that the work was not "in progress" within the meaning of the exception of such works in the provision of said charter (§ 91), requiring contracts for work not therein otherwise provided for, to be founded on sealed proposals and let to the lowest bidder; and, the work having been done without a contract let as prescribed, that an assessment therefor was invalid. *In re Weil.* 543.

9. Also, *held*, that the work could not be considered "in progress" because other streets referred to in the act of 1871 had been actually graded or the work thereon was in progress when the charter went into effect. *Id.*

10. Also, *held*, that the power of the commissioner of public works, under said act of 1871, to do the work unrestricted by the contract system was not preserved by the provision of said charter (§ 73) vesting in the department of public works created by the charter the powers and functions previously possessed by the department of public parks or the department of public works. *Id.*

ASSIGNMENT.

1. An assignee in good faith and for a valuable consideration of a recorded mortgage gets no preference over a prior unrecorded deed or mortgage by reason of such record, when his assignor could not claim it by reason of notice or any other equity. *Decker* v. *Boice.* 215

2. The contrary rule declared in *Jackson* v. *Van Valkenburgh* (8 Cow. 260), *held* to be no longer in force. *Id.*

3. Such assignee is, however, a purchaser, and his assignment is a conveyance under the Recording Act. (1 R. S. 756, §§ 37, 38.) *Id.*

4. If, therefore, the assignment is recorded before the recording of such prior deed or mortgage, he thereby obtains a preference; and an unrecorded conveyance is as to him void under said act. *Id.*

5. In an action for partition, plaintiff claimed title under a sale on foreclosure of two mortgages, both executed April 1, 1872. Two other mortgages were executed at the same time, all the mortgagees mutually agreeing that neither mortgage should have priority over either of the others, but that all should be equal liens. The mortgages under which plaintiff claimed were recorded in December, 1872; they were both assigned, the assignees taking for a valuable consideration and in good faith, and the assignments were recorded, one in January, 1874, the other in June, 1876. The other two mortgages were recorded, one in July, the other in August, 1877. *Held*, that the assignees of plaintiff's mortgages were subsequent purchasers under the Recording Act, and upon recording their assignments acquired a preference over the other mortgages, and that, therefore, plaintiffs acquired a valid title under the foreclosure sale. *Id.*

6. An assignment of an account may be made by oral agreement, without writing, or any written statement of the claim assigned; and, if founded on a valid consideration, vests in the assignee a right to proceed in his own name for the collection of the debt. *Risley* v. *Phenix Bk.* 318

7. So, also, an oral assignment for a valid consideration of a portion of a debt is valid. *Id.*

8. Where, concurrently with the giving of a check for a portion of the amount standing to the credit of the drawer upon the books of defendant, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and receive the portion of the debt assigned, *held*, that the check was not the contract between the parties, and so did not render oral evidence of the agreement inadmissible; and that the parol assignment was sufficient to vest in the plaintiff a title to the portion of the debt assigned. *Id.*

9. Plaintiff presented the check, and demanded payment, January 4, 1865, notifying defendant that so much of the claim of the drawer as was represented by the check had been transferred to him; defendant's president promised to pay on presentation by some person known to the bank. On the next day when the check was again presented, defendant refused to pay, on the ground that on the morning of that day the debt had been seized by the United States, in pursuance of proceedings instituted on that day, under the confiscation acts of Congress. These proceedings were set up as a defense, and on the trial defendant, to sustain the defense, offered in evidence the record of a District Court of the United States, showing that the deposit to the credit of the drawer was attached in proceedings against the estate, property, etc., of the bank of G. (the drawer), on deposit with the defendant on January 5, 1865, and that defendant paid over to the marshal, in pursuance of a decree of said court in such proceedings, the whole amount of the credit. The assignment to plaintiff was made in May, 1861, before the passage of the confiscation acts. *Held*, that the record constituted no defense, and was properly excluded; that if notice to defendant was necessary to complete plaintiff's title, sufficient notice was given the day prior to the seizure; that the plaintiff was not concluded by the adjudication of the District Court to the effect that the property seized belonged to the bank of G.; also that the District Court acquired no jurisdiction under said acts to proceed for the

forfeiture of a debt owing to a corporation. *Id.*

10. Defendant, S. E. H., assigned to plaintiff a certificate of stock in a manufacturing corporation "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. W. H. S. E. H. was the wife of E. W. H., who, at the time the assignment was executed, was largely indebted to the plaintiff and was on the verge of actual insolvency. In an action to foreclose plaintiff's lien upon the stock pledged, *held*, that the assignment, by its terms, included and secured all demands had and held by plaintiff against E., after its execution, as well as those existing at that time; and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security; and that an extension of time, by renewals in the ordinary course of business, granted by plaintiff to E. W. H. for payment of any of the debts, did not discharge the lien upon the stock. *Mer. Nat. Bank* v. *Hall*. 338

ATTACHMENT.

1. Judgment debts and moneys collected on execution by and in the hands of a sheriff are liable to attachment under process issued in an action against the judgment creditor. *Wehle* v. *Conner*. 231

2. The right so to attach is not affected by the fact that the judgment debtor is also the attaching creditor. *Id.*

3. Where property of an attachment debtor is already in the hands of the sheriff to whom the attachment is issued, no formal levy or notice is necessary to subject it to the lien of the attachment. *Id.*

4. Where, in an action against a sheriff for a failure to return a certain execution, defendant proved, in mitigation of damages, that prior to the return day the judgments were levied upon by virtue of attachments issued to him against the judgment creditor, *held*, that the fact that the sheriff failed to make a valid levy by virtue of the execution did not destroy or weaken the effect of the proof in mitigation; that it was immaterial whether the failure to return was because of a neglect to levy, or arose after levy and collection; in either event, while the attachments remained in force plaintiff was only entitled to nominal damages. *Id.*

5. Plaintiff offered to prove that there was a conspiracy between the attachment creditors, the judgment debtors and the sheriff, to issue the attachment "for the purpose of preventing the collection of plaintiff's judgment." *Held*, that the offer was properly excluded; that the fact that there was a conspiracy to do what the law authorizes did not affect the legality of the act. *Id.*

6. It was claimed that as two of the judgments were for costs they were not affected by the attachments, because of the precedence of the attorney's lien. *Held*, that until the lien was asserted by the attorney, who alone was entitled to and could claim it, the judgments were the property of the plaintiff; and that they were to be so considered here, as there was no offer to prove that the attorney had given notice of his claim or had attempted to enforce it. *Id.*

7. It was claimed that plaintiff was entitled to a judgment for the surplus of her judgments over the amounts claimed in the attachments. *Held*, untenable; that as the sheriff was required to keep so much of the property as would satisfy the attachment demands, with costs and expenses (Code of Procedure, § 232; Code of Civil Procedure, § 641), he had a right to exercise a reasonable discretion as to the amount so to be retained. *Id.*

8. The rule prohibiting the splitting up a single demand and bringing separate actions at law, has no ap-

plication to proceedings to vacate an attachment. *Steuben Co. Bank* v. *Alberger*. 274

9. So, also, the doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision, does not apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion. *Id.*

10. The fact, therefore, that a party has made a prior motion to vacate an attachment upon the ground that it is an obstruction to the enforcement of a judgment and execution, and was defeated thereon, does not preclude a second motion to vacate the attachment as far as it affects real estate, on the ground that it is a cloud upon an alleged title thereto of the moving party; and this although the party might have proceeded on the first motion upon this ground also. *Id.*

ATTORNEYS.

1. In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered if he chooses in his presence, by witnesses subject to cross-examination. *In re an Atty.* 164

2. Accordingly, *held*, that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue, was error: and that the order was not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder." *Id.*

——*An attorney's lien on judgment for costs can only be asserted by him; until so asserted judgment belongs to plaintiff and may be attached.*
See Wehle v. *Conner*. 231

——*When bond and mortgage of an attorney of one of the parties in a partition suit was deposited in good faith by the referee to sell as part of a fund directed to be deposited with and invested by the county treasurer in trust and the cestuis que trust with full knowledge have for years received the income they cannot repudiate the investment and impose it upon the referee.*
See Wiggins v. *Howard*. (*Mem.*) 613

BAIL.

——*Under the act of* 1879 (chap. 390 of Laws of 1879) *courts of Special Sessions have exclusive jurisdiction to try "charges for petit larceny not charged as a second offense" and the Supreme Court has no power to let to bail one charged with that offense.*
See People ex rel. v. *Dutcher*. 240

BANKS AND BANKING.

1. A check is a bill of exchange within the statute (1 R. S. 768, § 6), declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance is in writing. *Risley* v. *Phenix Bk.* 318

2. A verbal promise by a bank therefore to pay a check does not create a cause of action thereon. *Id.*

3. Where, concurrently with the giving of a check for a portion of the amount standing to the credit of the drawer upon the books of defendant, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and receive the portion of the debt assigned, *held*, that the check was not the contract between the parties, and so did not render oral evidence of the agreement inadmissible; and that the parol assignment was sufficient to vest in the plaintiff a title to the portion of the debt assigned. *Id.*

4. Plaintiff presented the check, and demanded payment, January 4, 1865, notifying defendant that so much of the claim of the drawer as was represented by the check had been transferred to him; defendant's president promised to pay on presentation by some person known to the bank. On the next day when the check was again presented, defendant refused to pay, on the ground that on the morning of that day the debt had been seized by the United States, in pursuance of proceedings instituted on that day, under the confiscation acts of Congress. These proceedings were set up as a defense, and on the trial defendant, to sustain the defense, offered in evidence the record of a District Court of the United States, showing that the deposit to the credit of the drawer was attached in proceedings against the estate, property, etc., of the bank of G. (the drawer), on deposit with the defendant on January 5, 1865, and that defendant paid over to the marshal, in pursuance of a decree of said court in such proceedings, the whole amount of the credit. The assignment to plaintiff was made in May, 1861, before the passage of the confiscation acts. *Held*, that the record constituted no defense, and was properly excluded; that if notice to defendant was necessary to complete plaintiff's title, sufficient notice was given the day prior to the seizure; that the plaintiff was not concluded by the adjudication of the District Court to the effect that the property seized belonged to the bank of G.; also that the District Court acquired no jurisdiction under said acts to proceed for the forfeiture of a debt owing to a corporation. *Id.*

5. The courts will take judicial notice of the general course of business in a community, including the universal practice of banks. *Mer. Nat. Bk.* v. *Hall*. 338

6. Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. *Duncan* v. *Brennan*. 487

7. Nor can it be so held although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general account cannot be invoked. *Id.*

BAWDY HOUSE.

1. It is not an essential element of the offense of keeping a disorderly house that the public should be disturbed by noise. The keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house. *King* v. *People*. 587

2. When the house of a person is the resort of prostitutes, plying their vocation, with his knowledge, this constitutes a bawdy house. *Id.*

BETTING AND GAMING.

—— *A common gambling house is a disorderly house.*
See King v. *People*. 587

BILL OF LADING.

1. Plaintiffs made advances to N. on pledge of the bill of lading of a cargo of corn, of which N. was general owner, and which was consigned to him at B. Upon arrival of the corn, plaintiffs consented that N. might designate the elevator in which it should be stored; this he did, and upon receiving from the master of the vessel the elevator receipt, instead of procuring a warehouse receipt in the names of plaintiffs, and delivering it to them, as according to usage it was his duty to do, he obtained such receipt in his own name. The plaintiffs knew that according to the usual course of dealing, the master would deliver the elevator receipt to the consignee on payment of freight, and that on such receipt a warehouse receipt would be issued to the consignee, or in the name of whom he should direct. They expected N. to pay the freight, and intended him to receive the elevator receipt. The corn arrived November 8th; plaint-

iffs paid no attention to its possession until November 18th, when they demanded repayment of their loan. Meanwhile, N. had shipped the corn to New York by canal, and on the faith of the canal boat bills of lading obtained advances from defendants who received the corn on arrival. *Held*, that conceding plaintiffs' claim could not be enforced as against defendants, as to which *quære*, yet it remained good as against N. or his creditors, and defendants would be entitled to protection against such claim only to the extent of their advances, and so far only as a lien on the corn or its proceeds was necessary to secure such advances; and, it appearing that defendants had in their hands other funds belonging to N. upon which they had a lien for, and had the right to apply to the payment of these advances, and which after notice of plaintiffs' claim they paid over to another on the order of N., *held*, that plaintiffs were entitled to demand, and upon refusal to pay, to maintain an action to recover the corn or its proceeds. *Hazard* v. *Fiske*. 287

2. Also, *held*, that plaintiffs' right to have such other funds applied to cancel defendants' lien was superior to the title thereto of an assignee in bankruptcy of N., or to that of any person to whom N. might have assigned the same. *Id.*

BILLS, NOTES AND CHECKS.

1. Where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. *Haynes* v. *Rudd*. 251

2. A check is a bill of exchange within the statute (1 R. S. 768, § 6), declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance is in writing. *Risley* v. *Phenix Bk.* 318

3. A verbal promise by a bank, therefore, to pay a check, does not create a cause of action thereon. *Id.*

BONDS.

1. Bonds issued in pursuance of a statute for and in the name of a town, to defray the expenses of a local improvement, are not necessarily invalid because of illegality of the provisions in the act for the levying of an assessment to pay the bonds. *Horn* v. *Town of New Lots*. 100

2. The T. and N. R. R. Co. executed a mortgage on its road to secure its bonds to defendant, the U. T. Co., as trustee for the bondholders, and bonds were prepared for issuing, each of which contained a clause that it should not become obligatory until authenticated by a certificate indorsed thereon duly signed by said trustee. Said bonds were signed by the proper officers of the company, but before the company's seal was affixed or the required certificate attached, a portion of them were stolen, a seal and certificate forged thereon, and the bonds sold; plaintiffs purchased them for a valuable consideration and in good faith. The T. and N. Co. was consolidated with defendant, the M., K. and T. R. Co.; by the agreement of consolidation the latter was to take up outstanding bonds of the former company, issuing its own in exchange. In an action to compel such an exchange for plaintiffs' bonds, *held*, that plaintiffs were bound by the condition in the bonds making the certificate of the trustee essential to their validity; that neither the payment of value nor good faith on their part created a cause of action; and that the defect in the bonds was not waived by the agreement of consolidation; also, that the failure of the obligor, after discovering that the bonds had been lost or stolen, to notify the public of that fact did not constitute negligence making it liable. *Maas* v. *M. K. & T. R. Co.* 223

3. Also, *held*, that the plaintiffs were not entitled to have returned to

them said forged bonds, which had been delivered for the purpose of exchange; that plaintiffs had no title to them, as they had never been issued or put in circulation by defendants, and so were the property of the T. and N. Co. *Id.*

4. Where a bond of indemnity given to an officer can reasonably be construed otherwise, a construction will not be given to it which will make the obligors liable for trespasses which they did not direct or authorize. *Clark* v. *Woodruff*. 518

5. Defendants obtained judgment against W. and issued execution thereon to plaintiff as marshal, who levied upon personal property to about double the amount of the execution. This property was claimed by D. & H. Defendants gave a bond of indemnity, a printed form being used; it contained a written recital of the levy and the claim of D. & H., and a printed condition to save plaintiff harmless from levying and selling under his execution "any personal property which he or they shall or may judge to belong to the judgment debtor." A portion of the property levied on which was not in fact the property of W. was taken from plaintiff's possession by some person unknown; upon his reporting the eloignment to the defendants they notified him that they should hold him responsible for the levy. Plaintiff thereafter, without the authority, knowledge or consent of defendants, levied upon and sold other property, the proceeds of which he paid to defendants who received it without any knowledge of such new levy. An action was brought by S. against plaintiff for such levy and sale and judgment recovered against him. In an action upon the bond, *held*, that it was intended simply to furnish indemnity for the levies already made; that its terms did not enlarge plaintiff's authority, and the subsequent unlawful levy and sale was made entirely at his risk, and that defendants were not liable. *Id.*

6. Also *held*, that the receipt by the defendants of the proceeds of the sale in ignorance of the facts was not a ratification; and that they were not affected by knowledge upon the part of their attorney, as he had no authority to bind them by directing a trespass or by ratifying one when committed. *Id.*

BRIDGE COMPANIES.

1. Plaintiff was incorporated to build a bridge over the C., a fresh water river; by its charter (chap. 119, Laws of 1808) the building of any other bridge by others within two miles of the bridge to be erected by it was prohibited. Plaintiff's exclusive right, however, could only be exercised while its bridge was passable. Plaintiff erected such bridge and maintained it. Thereafter the B. B. Co. was incorporated, and by the act of incorporation (chap. 164, Laws of 1855) was authorized to build a bridge within two miles, and did build one within 100 rods of plaintiff's bridge, and maintained it as a toll bridge for public travel. L., defendant's testator, was one of the principal promoters of the B. B. Co., its president and largest shareholder; he built the bridge by contract with the company, and aided in maintaining it and keeping it in repair up to his death; plaintiff, claiming that its charter constituted a contract, and that so far as the charter of the B. B. Co. authorized it to maintain a bridge for public travel, it was a violation of that contract, and so void, commenced suit against that corporation in 1856, to restrain it from constructing, using or allowing its bridge to be used for public travel, etc. Plaintiff was defeated in the courts of this State (27 N. Y. 87), but on appeal to the U. S. Supreme Court the judgment was reversed (3 Wall. 51), that court holding as claimed by plaintiff. In 1865, two years after the death of L., the bridge of the B. B. Co. was swept away by an unprecedented flood, it was carried down against plaintiff's bridge, and swept that away. This action was brought to recover

damages for the destruction of plaintiff's bridge, and for the loss of tolls. *Held*, that plaintiff was not entitled to recover for the loss of its bridge; that the B. B. Co. had the right to erect its bridge, and could maintain it for public travel whenever plaintiff's bridge was impassable; the structure itself was, therefore, neither unlawful nor a nuisance when maintained with proper care, even if built designedly as a toll-bridge for public travel; but, *held*, that L. was liable for the wrongful diversion of tolls from plaintiff's bridge; that as the charter of the B. B. Co. so far as it authorized it to maintain its bridge for public travel was unconstitutional and void, it afforded no protection to those acting under it. *Chenango Bridge Co.* v. *Paige*. 178

2. Also, *held*, that the provision of the Revised Statutes (2 R. S. 602, § 66) providing that where a construction has been put upon a statute by the Supreme Court every act done in good faith in conformity to that construction after such decision, and before reversal, shall be so far valid as to excuse from liability for a penalty or forfeiture, did not apply, as the action was not to enforce a penalty or forfeiture. *Id.*

3. Also *held*, that even if the charter of the B. B. Co. was wholly void, so that those who built the bridge had no corporate protection, then the bridge would be considered as built by individuals having the rights of riparian proprietors, and as they could lawfully build it for their own use, it was not a nuisance or unlawful. *Id.*

BROKERS.

1. A broker who effects insurance under no employment by the insurers, but for a commission paid by them, upon the premiums received, for such risks as he procures to be offered and they choose to accept, is not an agent in such a sense that they will be bound by notice to him after policies are issued. *Devens* v. *Mech. & Tr. Ins. Co.* 168

2. The duty of a broker, employed to sell property, is to bring the buyer and seller to an agreement. While it is not essential that he should be present and an active participator in the agreement or sale when it is actually concluded, to entitle him to his commissions he must produce a purchaser ready and willing to enter into a contract on the employer's terms. He is not entitled to commissions for unsuccessful efforts to effect a sale, unless the failure is caused by the fault of the principal. *Sibbald* v. *Beth. Iron Co.* 378

3. Where no time for the continuance of the contract between the broker and his principal is fixed, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. *Id.*

4. Where the broker has been allowed a reasonable time to procure a purchaser and effect a sale, and has failed so to do, and the principal in good faith has terminated the agency, and sought other assistance by means of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions. *Id.*

5. Defendant employed plaintiff, a broker, to sell the steel rails of its manufacture to the G. T. R. R. Co. After various unsuccessful negotiations for a sale, carried on during a period of four months, between that company and plaintiff, during which defendant had fixed its prices several times upon receipt of a telegram from said company, asking upon what terms, one thousand tons of defendant's rails would be delivered, plaintiff telegraphed to defendant asking its lowest terms. Defendant declined to fix a price or to negotiate farther through plaintiff; and the latter thereupon telegraphed to the G. T. R. R. Co. that defendant de-

clined to name a price. Subsequently a sale was made by defendant to said company through another broker. Upon the trial of an action to recover commissions, the court was requested to charge that defendant had the right, under the circumstances, to refuse to use the services of plaintiff if the action was taken in good faith and without intent to deprive him of his commissions. The court so charged, with the qualification, however, that defendant had no right, acting either in good or bad faith, to avail itself of what plaintiff had done, to make a sale through other agencies. *Held*, that the qualification was error; that defendant had the right to terminate the agency as it did; and, if done in good faith, plaintiff had no right to compensation although his efforts were of benefit in the subsequent successful negotiation. *Id.*

BURGLARY.

1. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention to return the keys, or that the street door key was ever recovered. *Held*, that the evidence justified the jury in finding a felonious taking of the key from W. against his will and in his presence by violence to his person and by putting him in fear of immediate personal injury, and that such a finding established robbery in the first degree (2 R. S. 677, § 55); that the intent with which they took the key was a question of fact for the jury, and if they found that the robbers took it with intent to appropriate it, the use subsequently made of the key although in the minds of the robbers at the time of the taking could not affect the question of their guilt; and that it was immaterial whether the robbers formed the plan of taking the key before they entered the room or whether it was an after-thought suggested by seeing it on the table. *Hope* v. *People*. 418

2. Also, *held*, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery. *Id.*

3. Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial. *Id.*

4. Also *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank. *Id.*

CARRIER.

See COMMON CARRIER.

CASES REVERSED, DISTINGUISHED, ETC.

Ranney v. *Peyser* (20 Hun, 11) reversed. *Ranney* v. *Peyser*. 1

Marie v. *Garrison* (13 J. & S. 158), reversed. *Marie* v. *Garrison*. 14

Le Roy v. *Globe Ins. Co.* (2 Edw. Ch. 657), distinguished. *Peckham* v. *Van Wagenen*. 45

In re Le Blanc (75 N. Y. 598), distinguished. *Peckham* v. *Van Wagenen*. 45

Fischer v. *Raab* (56 How. Pr. 218; 58 id. 221), distinguished. *Geib* v. *Topping*. 47

Adams v. *Hopkins* (5 Johns. 252) distinguished. *Geib* v. *Topping*. 48

Ousterhout v. *Day* (9 Johns. 114), distinguished. *Geib* v. *Topping*. 48

Goodhue v. *Berrien* (2 Sandf. Ch. 630), distinguished. *Bergen* v. *Urbahn*. 51

Blackstone Bk. v. *Hill* (10 Pick. 129), distinguished. *Jones* v. *Benedict*. 86

Cowperthwaite v. *Sheffield* (1 Sandf. 416; 3 N. Y. 243), distinguished. *Jones* v. *Benedict*. 86

Bridenbecker v. *Lowell* (32 Barb. 9), distinguished. *Jones* v. *Benedict*. 86

Peyser v. *Mayor, etc.* (70 N. Y. 497), distinguished. *Horn* v. *Town of New Lots*. 104

In re Lima (77 N. Y. 170), distinguished. *Horn* v. *Town of New Lots*. 104

Wilkes v. *Mayor, etc.* (79 N. Y. 621), distinguished. *Horn* v. *Town of New Lots*. 104

City of Rochester v. *Town of Rush*. (80 N. Y. 302), distinguished. *Horn* v. *Town of New Lots*. 106

Belknap v. *Sealey* (14 N. Y. 144), distinguished. *Callmeyer* v. *Mayor, etc.* 120

Lowery v. *B. C. & N. R. R. Co.* (78 N. Y. 28), distinguished. *Wooley* v. *Grand St. & N. R. R. Co.* 127

Alexander v. *Germania F. Ins. Co.* (66 N. Y. 464), distinguished. *Woodruff* v. *Imperial F. Ins. Co.* 140

Ashworth v. *Builders' & M. F. Ins. Co.* (112 Mass. 422), distinguished. *Woodruff* v. *Imperial F. Ins. Co.* 140

Chase v. *Hamilton Ins. Co.* (20 N. Y. 52), distinguished. *Woodruff* v. *Imperial F. Ins. Co.* 140

Walsh v. *Hartford F. Ins. Co.* (73 N. Y. 6), distinguished. *Woodruff* v. *Imperial F. Ins. Co.* 140

Brink v. *Hanover F. Ins. Co.* (80 N. Y. 108), distinguished. *Devens* v. *Mechanics & Trad. Ins. Co.* 173

Chenango Bridge Co. v. *Paige* (8 Hun, 292), reversed. *Chenango Bridge Co.* v. *Paige*. 179

Benedict v. *Howard* (31 Barb. 569), distinguished. *Osborn* v. *Schenck*. 206

Van Dorn v. *Balty* (11 Hun, 239), distinguished. *Osborn* v. *Schenck*. 206

Davies v. *Mayor, etc.* (13 J. & S. 373), reversed. *Davies* v. *Mayor, etc.* 207

Westbrook v. *Gleason* (79 N. Y. 23), distinguished. *Decker* v. *Boice*. 220

Greene v. *Warnick* (64 N. Y. 220), distinguished. *Decker* v. *Boice*. 221

Crane v. *Turner* (67 N. Y. 437), distinguished. *Decker* v. *Boice*. 222

Wilder v. *Bailey* (3 Mass. 289), disapproved. *Wehle* v. *Conner*. 237

Pollard v. *Ross* (5 Mass. 319), disapproved. *Wehle* v. *Conner*. 237

People ex rel. Comaford v. *Dutcher* (20 Hun, 241), reversed. *People ex rel. Comaford* v. *Dutcher*. 240

Haynes v. *Rudd* (17 Hun, 477), reversed. *Haynes* v. *Rudd*. 251

Hinckley v. *Krietz* (58 N. Y. 583), distinguished. *Church* v. *Simmons*. 261

Post v. *Campbell* (18 Hun, 51), affirmed, but principle enunciated below overruled. *Post* v. *Campbell*. 279

Miller v. *White* (50 N. Y. 137), distinguished. *Stephens* v. *Fox*. 317

McMahon v. *Macy* (51 N. Y. 155), distinguished. *Stephens* v. *Fox*. 317

Holley v. *Mayor, &c.* (59 N. Y. 170), distinguished and limited. *Rowland* v. *Mayor, &c.* 377

Brennan v. *Mayor, &c.* (62 N. Y. 365), distinguished and limited. *Rowland* v. *Mayor, &c.* 377

Wines v. *Mayor, &c.* (70 N. Y. 613), distinguished. *Rowland* v. *Mayor, &c.* 377

Elliott v. *Fitchburg R. R. Co.* (10 Cush. 191), distinguished. *Garwood* v. *N. Y. C. & H. R. R. R. Co.* 407

Earl of S. v. *Great No. R. R. Co.* (L. R. [10 Ch. Div.] 707), distinguished. *Garwood* v. *N. Y. C. & H. R. R. R. Co.* 407

People v. *Parish* (4 Den. 153), distinguished. *McCarney* v. *People*. 417

First v. *Second Ave. R. R. Co.* (72 N. Y. 542), distinguished. *McCarney* v. *People*. 417

Greenfield v. *People* (74 N. Y. 277), distinguished. *People ex rel. Phelps* v. *Oyer and Terminer*. 458

Reg. v. *Chandler* (Dearsley's Cr. Cas. 453), distinguished. *Cowley* v. *People*. 474

Reg. v. *Downes* (1 Q. B. Div. 25), distinguished. *Cowley* v. *People*. 474

Hynes v. *McDermott* (82 N. Y. 41), distinguished. *Cowley* v. *People*. 479

Newberry v. *Lee* (3 Hill, 523), distinguished. *Clark* v. *Woodruff*. 526

Armstrong v. *Dubois* (1 Abb. Ct. App. Dec. 11), distinguished. *Clark* v. *Woodruff*. 526

Stewart v. *Wells* (6 Barb. 79), distinguished. *Clark* v. *Woodruff*. 526

Barker v. *Braham* (3 Wils. 396), distinguished. *Clark* v. *Woodruff*. 526

Bates v. *Pilling* (6 B. & C. 38), distinguished. *Clark* v. *Woodruff*. 526

Brown v. *Feeter* (7 Wend. 301), distinguished. *Clark* v. *Woodruff*. 526

Swift v. *Mayor, &c.* (17 Hun, 518), reversed. *Swift* v. *Mayor, &c.* 528

Maxmillian v. *Mayor, &c.* (62 N. Y. 160), distinguished. *Swift* v. *Mayor, &c.* 534

Ham v. *Mayor, &c.* (70 N. Y. 463), distinguished. *Swift* v. *Mayor, &c.* 534

Cregin v. *B'klyn Crosstown R. R. Co.* (19 Hun, 341), reversed. *Cregin* v. *B'klyn Crosstown R. R. Co.* 595

Riggs v. *Pursell* (74 N. Y. 374), distinguished. *Taylor* v. *Mayor, &c.* 626

CAUSE OF ACTION.

1. Where a stockholder receives from a corporation dividends declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated. *Peckham* v. *Van Wagenen*. 40

2. *It seems* that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company. *Id.*

3. He cannot follow the assets of the company in the hands of parties to whom it has paid them, until at least he has established his rights as a creditor of the company and has exhausted his legal remedies against it. *Id.*

4. Where separate purchases of goods are made at different times upon a credit for a specified time,

the different sales do not constitute an entire and indivisible demand, but a cause of action accrues when the term of credit expires as to any one sale, and the vendor may bring separate actions for each sale. *Zimmerman* v. *Erhard*. 74

5. The pendency of an action, therefore, to recover for goods so sold at one date is not a defense to an action for goods sold at a subsequent date. *Id.*

6. The rendering of an account by the vendor containing all the items does not change the nature of the contracts, or show that the transactions were not separate and distinct. *Id.*

7. Where an assessment is not only unconstitutional and void, but has been so judicially declared and the invalidity is such that it must appear upon the proof necessary to be made to sustain proceedings under it, it is not essential to the maintenance of an action to recover back moneys collected under the assessment that it should first be judicially vacated. *Horn* v. *Town of New Lots*. 100

8. Where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. *Haynes* v. *Rudd*. 251

9. As to whether one who aids in doing a criminal act can, under any circumstances, have an action to recover any thing paid by him in furtherance thereof, *quære*. *Id.*

10. Where a particular mode of discharging the obligations of a municipal corporation is provided by law, that mode must be pursued; and it is only when the corporation is put in default in omitting to discharge some duty imposed upon it by statute after the proper steps have been taken, that an action will lie against it, unless it has by some act of its own, outside of the original indebtedness, rendered itself liable. *Swift* v. *Mayor, &c.* 528

11. An action is not maintainable against a department of a city government. *Id.*

12. Plaintiff was employed by the police department in March, 1874, to remove the garbage from the streets at an agreed compensation of $800 per month; the employment terminable at the pleasure of the department, and it was so terminated in July, 1874. Plaintiff's bills were paid for two months. For the residue of the time they were rendered, but not paid. From March, 1874, to January 17, 1877, there was upon the books of the street cleaning bureau of the police department an unexpended balance of appropriations for the year 1874, more than sufficient to pay plaintiff's claim; this was paid into the city treasury on the day last named. Plaintiff duly presented his claim to the comptroller and demanded payment, which demand was not complied with. In an action to recover the balance unpaid, *held*, that the action was not maintainable against the police department; but that as it appeared that at the time plaintiff's claim accrued there was in the street cleaning department money sufficient and legally appropriated to the payment thereof, and as after notice thereof the department paid this fund into the city treasury, where, so far as appeared, it still remained, it constituted a specific fund upon which the law impressed a trust for the payment of his claim which the plaintiff was entitled to have so applied; and that as the corporation took the fund with notice of the trust and of plaintiff's claim, an action was maintainable against it to compel the execution of the trust. *Id.*

13. Where in the pleadings and upon the trial the plaintiff avers a cause of action *ex delicto*, he cannot in an appellate court abandon that claim

and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered. *Lockwood* v. *Quackenbush*. 607

CERTIFICATE.

It seems, also, that the certificate of a clerk of the proper county as to the non-filing of a paper is defective where it omits to state that diligent search for it has been made in his office, as required by section 921 of the Code of Civil Procedure. *Briggs* v. *Waldron*. 582

CHALLENGE OF JURORS.

—— *On criminal trial for principal cause and for favor, when properly overruled.*

See People ex rel. v. *Oyer and Terminer of N. Y. Co.* 437

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. Plaintiffs, who were bankers, loaned to B. Bros. & H. $10,000, upon the specific pledge of a quantity of whisky; this loan was paid in full. Prior and subsequent to this loan plaintiffs made other advances to said firm to a large amount. The whisky was levied on by B., defendant's testator, then sheriff, under attachments against M. On the trial of an action to recover possession of the whisky, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whisky was the property of M.; this evidence was excluded. *Held*, error, that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them. *Duncan* v. *Brennan*. 487

2. Also *held*, that as plaintiff had no right of possession at the time of the levy, a denial of a motion to dismiss the complaint was error. *Id.*

3. Replevin will not lie by one tenant in common of a chattel against another for taking the chattel, and if one of them sells his interest to a third party he has the right to deliver the chattel to the purchaser, and neither he nor any one assisting him in so doing is liable to an action. *Hudson* v. *Swan*. 552

4. Where, in the complaint and upon the trial of an action to recover possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and in any event, before the lien can be restored, the false claim of title must be abandoned, the title of the true owner conceded and the claim reduced to one of lien. *Id.*

CODE OF PROCEDURE.

§ 28. *Rowland* v. *The Mayor*. 372
§ 88. *Clarke* v. *Gibbons*. 107
§ 116. *Gotendorf* v. *Goldschmidt*. 110
§ 232. *Wehle* v. *Conner*. 231
§ 338. *Church* v. *Simmons*. 261
§ 448. *Gotendorf* v. *Goldschmidt*. 110

CODE OF CIVIL PROCEDURE.

§ 184. *U. D. S. Inst.* v. *Anderson*. 174
§ 309. *Weaver* v. *Ely*. 89
§§ 488, 546. *Marie* v. *Garrison*. 14
§ 641. *Wehle* v. *Conner*. 231
§ 723. *Harris* v. *Tumbridge*. 92
§ 791. *Taylor* v. *Wing*. 527
§ 921. *Briggs* v. *Waldron*. 582
§ 983. *Veeder* v. *Baker*. 156
§ 997. *Schwinger* v. *Raymond*. 192
§ 1019. *Geib* v. *Topping* 46

COMMERCIAL AGENCIES.

—— *False representations made to, when ground for action for deceit.*

See E. C. & B. Co. v. *Avery*. 31

COMMISSION (TO TAKE TESTIMONY).

1. The power of the court to award a commission without the consent of parties to take the testimony of a witness out of the State depends entirely on statute, and can only be exercised in the cases therein specified. *In re an Atty*. 164

2. The provisions of the Code of Civil Procedure in reference to taking depositions out of the State (§§ 887 *et seq.*) relate to actions only. *Id.*

3. In proceedings to disbar an attorney he can only be convicted on evidence good at common law, delivered if he chooses in his presence, by witnesses subject to cross-examination. *Id.*

4. Accordingly, *held*, that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue was error; and that the order was not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder." *Id.*

COMMON CARRIER.

1. Where a common carrier performs his contract to transport and deliver goods, a payment of the freight or a submission to judgment therefor does not preclude the owner of the goods from recovering damages for injuries thereto while *en route;* he may pay the freight and sue for the damages, or set up his damages by way of counter-claim in an action to recover the freight or he may bring a cross-action. *Schwinger* v. *Raymond.* 192

2. A shipper, by consenting that his goods may be carried on deck, does not thereby assume the risk of loss or injury to them. *Id.*

3. Where a carrier by canal neglects to protect his cargo, or to furnish means by which it may be done, according to his contract, and the cargo in consequence is injured by frequent rains, this does not constitute a marine disaster, and he is liable for the damages. *Id.*

4. This action was brought to recover freight agreed to be paid for transporting 200 barrels of beans on the deck of a canal boat to New York. Defendant's answer admitted the agreement to pay the freight and the transportation, but alleged that, through the negligence of the plaintiff, the beans were wet and damaged, and asked judgment for the damages, less the freight. At the close of the trial defendants' counsel submitted certain propositions of fact and law, "each and every" of which he requested the referee to find as stated. The conclusions of law were: 1st. That plaintiff was "entitled to recover" the amounts claimed for freight; 2d. That defendants were "entitled to recover" a sum specified for their damages; 3d. That defendants were "entitled to judgment" for the balance. The referee found the first proposition, but refused to find the other two; to the refusal to find defendants' counsel excepted, but did not except to the finding. The General Term, on appeal, *held*, that the finding, in accordance with the request and the omission to except thereto, entitled plaintiff to maintain his judgment. *Held*, error; that the three propositions so submitted should have been taken together and construed as one sentence; and so taken, the request was that defendants have judgment upon the adjustment of the two claims, for the difference between them; and that, therefore, defendants were entitled to a review of the refusals to find and the referee's conclusions of law. *Id.*

5. The referee found that plaintiff undertook to furnish lumber sufficient to cover and shelter the beans while on the boat so that they would be perfectly protected from rain; that they were delivered to him in good order; that the captain of the boat was warned that it was about to rain and requested to procure lumber; that he refused and left the place where they were loaded, while defendants' agent was absent, without any covering whatever over the beans; that it rained during the voyage and, in consequence of the want of sufficient covering, the

beans were wet and damaged, and the referee found the amount of loss in consequence. *Held*, that these findings established error in the refusal of the referee to find the conclusions of law as requested. *Id.*

6. Also, *held*, that the fact that defendants knew the beans were not covered when the boat departed did not excuse the plaintiff. *Id.*

7. In an action against a common carrier by sea to recover damages for injuries to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the protest and some of the testimony and the evidence covering a great variety of facts, a witness called as an expert by plaintiff, after having testified that he had heard the testimony read to the jury the previous day, and the protest and had heard the testimony of one or two of the witnesses and the circumstances as detailed by them, was asked "under the circumstances detailed by these witnesses and in the protest," and under certain circumstances which were specified, "what in your opinion should have been done by the persons in charge of the steamship?" *Held*, incompetent. *Guiterman* v. *Liv. N. Y., etc., Co.* 358

8. Under the English statutes in relation to compulsory pilotage in the port of Liverpool an owner of a vessel is not relieved from liability for damage to freight unless a pilot was in charge under the act, and was actually and necessarily engaged in the discharge of his duty. *Id.*

9. Where, therefore, a vessel had left its dock at Liverpool in charge of a pilot and anchored in the river Mersey to finish loading and to receive coal for a voyage to New York, and while at anchor an accident occurred causing the loss, *held*, that the owner was not excused from liability by said statute. *Id.*

10. The goods damaged were sold at public auction. *Held*, that evidence of the prices brought was competent as tending to show value, and upon the question of damages. *Id.*

CONFLICT OF LAWS.

A will executed in 1663 by a resident in the now county of Albany, then part of the New Netherlands, directed that the "four first born children" of the testator "shall divide out of their father's property the sum of one thousand guilders, to be paid by them out of the proceeds of a certain farm * * * before any other division takes place." *Held*, that this did not work an equitable conversion of the farm from real estate into personalty; that the distinction in the English law between the descent of real and the distribution of personal estate, upon which the doctrine of equitable conversion was founded, did not exist in the law which prevailed in New Netherlands at the time the will was made; also, that the effect of the provision was simply to create a charge upon the land in the hands of the devisees; and that assuming that by implication a power and duty was imposed on the "universal heirs" to sell, this power would not devolve upon an administrator with the will annexed. *Van Giessen* v. *Bridgford.* 348

CONSIDERATION.

——*Sufficiency of.*
See Marie v. *Garrison.* 14
Hand v. *Kennedy.* 149

CONSTITUTIONAL LAW.

1. The provision of the State Constitution (art. 6, § 26), declaring that "courts of Special Sessions shall have such jurisdiction of offenses

of the grade of misdemeanors as may be prescribed by law" is not limited to offenses of the grade specified, created by statute after the adoption of that provision; it includes as well all such offenses existing by statute at that time, including petit larceny. *People ex rel. Comaford* v. *Dutcher*. 240

2. The said provision also was intended to confer authority upon said courts as they were then or might thereafter be constituted by statute and without regard to the question whether or not they were authorized to summon and impanel a common-law jury. *Id.*

3. The provision of the act of 1879 (chap. 390, Laws of 1879), giving to courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offense," is constitutional and valid. *Id.*

CONSTRUCTION.

1. In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words where they are in conflict and tend to different results. *Clark* v. *Woodruff*. 518.

2. Where a bond of indemnity given to an officer can reasonably be construed otherwise, a construction will not be given to it which will make the obligors liable for trespasses which they did not direct or authorize. *Id.*

CONTRACT.

1. Plaintiffs' complaint alleged in substance that they were the owners in their own right and in trust for others, with full power of disposal, of certain shares of the stock of the P. R. R. Co.; that an action to foreclose a third mortgage on the road, brought in the interest of the defendant G., who owned a majority of the bonds secured by the mortgage, was pending, which action certain of the stockholders were defending, on the ground that the bonds were collusive and fraudulent; that some of the plaintiffs had filed a petition to come in and defend, when G., with a view to a compromise, promised by letter that in consideration of the relinquishment by plaintiffs and defendant D. of further opposition to the foreclosure, in case he purchased the road on foreclosure sale, he would, upon the plaintiffs organizing a successor company and complying with certain conditions specified, convey the road to them; that plaintiffs performed the preliminary obligations contained in said agreement to be performed on their part, and in consequence G. procured a decree of foreclosure, and a sale of the road was effected; that the decree of foreclosure and sale would not have been made without their co-operation and consent; that after the making of said agreement and in consideration of the surrender of the letter by plaintiffs, and of their consent to a modification of the terms of the agreement, G. agreed that, in case of a sale under the decree, he would become the purchaser, and would forthwith organize a successor company, and convey the road to it, and would deliver to plaintiffs in return for their stock an equal amount of paid-up stock of the new company; that the road was purchased on the foreclosure for the benefit of G., and a new company was organized, to which the property was conveyed, but that G. refused to perform his agreement to issue the new shares in exchange for plaintiffs' stock. Upon demurrer to the complaint, *held*, that its averments were sufficient to constitute a cause of action, that it alleged a sufficient consideration for the original promise of G., and the surrender of the option given thereby to plaintiffs was a sufficient consideration for the substituted agreement. Also, that the averment of a refusal by G. to issue new shares in exchange for the old stock implied a tender

of the old shares. *Marie* v. *Garrison*. 14.

2. It is not essential to the existence of a consideration for a promise that mutuality of obligation should exist between the parties at the time of the making of the promise. *Id.*

3. Where a proposition is made by one party accompanied by a promise, a voluntary performance by another to whom the proposition was made, of the requirements in consideration of the promise, constitutes a consideration which will uphold the promise. and make it binding. *Id.*

4. The agreement was claimed to be unlawful, as a collusive arrangement to establish a fraudulent debt and as calculated to prevent competitive bidding on the foreclosure sale. *Held*, untenable. *Id.*

5. The mere fact that an arrangement entered into by parties having an interest in property about to be sold at public or judicial sale, with honest motives, for the purpose of preserving their interests, may incidentally restrict competition upon such sale, does not render the agreement illegal. *Id.*

6. Plaintiff purchased, through the agency of defendant, a stock option or privilege known as a "straddle," which secured to her the right to demand of the seller, at a price stated, a certain number of shares of a specified stock, or to require him to take said stock at the same price, within sixty days. Plaintiff was induced to make the purchase by printed circulars issued by defendant, explaining the nature of a "straddle," offering to purchase one of his selection upon payment of a specified sum, and guaranteeing that fluctuations in the stock during the pendency of the contract would amount to eight per cent, and in case it did not, agreeing to refund the amount paid, less commissions. Plaintiff authorized defendant, as her agent, to exercise the option. On the next day after the purchase defendant sold the stock "short," which resulted in a loss. Defendant claimed on appeal that this was a gambling transaction, and as such prohibited by statute. No such defense was set up in the answer. *Held*, that the contract was not of necessity a wager contract; that this was for defendant to prove; and that the fact that it might have been so did not dispense with the necessity of proving that it was. *Harris* v. *Tumbridge*. 92

7. Defendant offered evidence that it was common for parties purchasing "straddles" to operate in stock, holding the straddle as security; this was excluded, and the court charged that plaintiff, in order to be bound by any such custom, must have been aware of it. *Held*, no error. *Id.*

8. The department of docks of the city of New York advertised for proposals for furnishing certain iron materials; the notice specified the period of the contract (six months), and stated that the materials must be delivered as called for by the requisitions of the treasurer, and that any bidder "must be engaged in and well prepared for the business." The contract was entered into with plaintiff; in it the quantities of material were stated as "more or less," and it was agreed that the deliveries should be "in such quantities * * * as shall be directed by the treasurer," also that the materials should be furnished "according to the specifications and the requirements of the treasurer under them;" and payments were to be made upon the engineer's certificate that "the quantities have been delivered as per requisition and in accordance with specifications." In the specifications each statement of quantity was followed by the words "more or less." *Held*, that the agreement was not for any definite or fixed quantity of material; but that plaintiff was to deliver and the city only bound to accept what was needed by the department and called for by its official requisi-

tions; and that, therefore, an action to recover damages because of failure to take the quantities stated in the specifications was not maintainable. *Callmeyer* v. *Mayor, etc., of N. Y.* 116

9. In pursuance of an invalid ordinance of the common council, the Croton aqueduct board of the city of New York advertised for proposals for paving a street. On October 15, 1869, the proposals for the work were opened, plaintiff was announced to be the lowest bidder, and the contract was awarded to him. Plaintiff's proposal was accompanied by a bond with sureties as required by the specifications. On December 18, 1869, the common council, by resolution, rescinded the ordinance. Plaintiff thereafter demanded, of the said board, that the contract should be executed, which was refused. In May, 1872, plaintiff presented the papers to the commissioners appointed under the act of 1872 (chap. 580, Laws of 1872), who gave a certificate that there was no fraud in the award. In an action to recover damages; *held*, that the award of the contract by the board was an approval of a sufficiency of the sureties and no other was needed; that the security mentioned in section 38 of the city charter of 1857 (chap. 446, Laws of 1857), which is required to be approved by the comptroller, was that required of the contractor on entering into the formal contract after the award to him, but, *held*, that the ordinance not having been legally passed all subsequent proceedings were invalid and plaintiff acquired no rights under it; that, as previous to the passage of the act of 1872, the ordinance was annulled, there was nothing for the commissioners to act upon; and that, therefore, plaintiff was not entitled to recover. *Baird* v. *Mayor, etc.* 254

10. *It seems*, that had the ordinance, authorizing the work, been valid and the proceedings, prior to opening the bids, regular, plaintiff would have had a valid contract for the breach of which he could have claimed damages (chap. 308, Laws of 1861); and that, having such a contract, it could not be destroyed by the rescission of the ordinance. *Id.*

11. Also, that the quantities mentioned in the specifications were proper to be taken as *prima facie* the amount of work to be done; and that the prices specified in the proposal, less what the work could have been done for, furnished the proper measure of damages. *Id.*

12. Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase-money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral security for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. Plaintiff, before bringing this action, foreclosed his mortgages,

bidding in the premises and obtaining judgments for deficiencies. *Held*, that neither the taking possession and completing the buildings, nor the foreclosures worked a rescission of the contract on the part of plaintiff; also that a reservation of said contract in the foreclosure judgments was not necessary. *Kidd* v. *McCormick*. 391

13. In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words where they are in conflict and tend to different results. *Clark* v. *Woodruff*. 518

14. Plaintiff was employed by the police department in March, 1874, to remove the garbage from the streets at an agreed compensation of $800 per month; the employment terminable at the pleasure of the department, and it was so terminated in July, 1874. Plaintiff's bills were paid for two months. For the residue of the time they were rendered, but not paid. From March, 1874, to January 17, 1877, there was upon the books of the street cleaning bureau of the police department an unexpended balance of appropriations for the year 1874, more than sufficient to pay plaintiff's claim; this was paid into the city treasury on the day last named. Plaintiff duly presented his claim to the comptroller and demanded payment, which demand was not complied with. In an action to recover the balance unpaid, *held*, that the contract for the work was not within the provision of said charter (§ 91), providing that where work is necessary to be done to complete or perfect a particular job for the corporation, involving an expenditure of over $1,000, the same shall be let by contract, after advertisement, to the lowest bidder; as the work here was not done to complete any particular job, and it did not necessarily involve an expenditure of more than $1,000. *Swift* v. *Mayor, etc.* 528

—— *For work in city of New York, validity of.*
See In re Marsh. 431

—— *Validity of, between principal and agent, by which the latter expressly agrees to insure former from loss.*
See Loeb v. *Hellman.* (*Mem.*) 601

—— *In an action on contract to build sewers, defendant set up, as a counter-claim, damages for breach of contract in not completing the work. Held, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it, but this did not preclude it from insisting upon the counter-claim.*
See Taylor v. *The Mayor.* (*Mem.*) 625

CONVERSION.

1. The fact of the possession and use by one of two tenants in common of personal property, of the property so held, even though it prevents the possession and use by the other, furnishes no ground to the latter for an action for conversion. *Osborn* v. *Schenck*. 201

2. *It seems*, however, that if the possession develops into a destruction of the property, or of the interest of the co-tenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment, or if it ends in a sale of the whole property, ignoring the rights of such co-tenant, then a conversion is established. *Id.*

3. A purchaser, however, from the co-tenant who has assumed to sell the whole property is not made liable simply from his purchase and claim to be sole owner. *Id.*

4. Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants gave them, as security, a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half, and plaintiff the other half. The payments stipulated in the mortgage were

fixed so as to correspond, in amounts and dates, with the rents reserved in the lease which was looked to, to discharge the mortgage debt. In an action for conversion of plaintiff's interest, *held*, that the taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P.; that the effect of the mortgage was simply to vest the interest of P., upon default, in defendants. *Id.*

5. Defendant H. B. S., after default, removed the machine from the possession of the lessees, claiming a right so to do. It appeared that no demand was made upon him before suit brought, and until after that time he neither did nor said any thing in denial of plaintiff's right as co-tenant. *Held*, that the taking possession was simply the exercise of defendants' rights as co-tenants, and neither made the defendants jointly nor H. B. S. individually liable. *Id.*

CORPORATIONS.

1. Where a stockholder receives from a corporation dividends declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated. *Peckham* v. *Van Wagenen*. 40

2. *It seems* that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company. *Id.*

3. He cannot follow the assets of the company in the hands of parties to whom it has paid them, until, at least, he has established his rights as a creditor of the company, and has exhausted his legal remedies against it. *Id.*

4. The confiscation acts of Congress do not contemplate or authorize the confiscation of the property of a corporation. *Risley* v. *Phenix Bk.* 318

5. One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority. *Alexander* v. *Cauldwell.* 480

6. It cannot be presumed that the agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in. *Id.*

See BRIDGE COMPANIES.
CHARITABLE ASSOCIATIONS.
GAS-LIGHT COMPANIES.
INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MINING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.

COSTS.

The will of R. gave to plaintiffs certain legacies, payable after the debts of the testator had been discharged. Plaintiffs brought this action for an accounting by certain of the defendants, as executors and trustees under said will, and for a payment of the amount found due, out of the property in their hands; or, if this proved insufficient, out of the real estate in the hands of the other defendants, "so far as the same might be applicable." The referee found that the testator was insolvent, that the real estate in question was sold to pay debts and the complaint was dismissed. Defendants appeared by different attorneys, and an extra allowance of costs was made to each. *Held*, error; that the facts furnished no basis on which an extra allowance could be computed under the provision of the Code of Civil Procedure in reference thereto (§ 309), as there was no "recovery," or "claim" for the payment of any fixed sum and "the subject-matter involved'

was plaintiffs' interest when ascertained, which proved to be nothing. *Weaver* v. *Ely*. 89

—— *An attorney's lien on judgment for costs can only be asserted by him; until so asserted judgment belongs to plaintiff and may be attached.* *See Wehle* v. *Conner*. 231

COUNTER-CLAIM.

—— *In an action on contract to build sewers, defendant set up as a counter-claim, damages for breach of contract in not completing the work. Held, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it, but this did not preclude it from insisting upon the counter-claim. Taylor* v. *The Mayor*. (*Mem.*) 625

COUNTIES.

A municipal corporation or a county has the power to lease real estate when the use thereof is needed to carry out any of its acknowledged powers and purposes. *Davies* v. *Mayor, etc.* 207

COURTS.

See COURT OF APPEALS.
COURTS OF SESSIONS.
SUPREME COURT.
SURROGATE'S COURT.

COURT OF APPEALS.

When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order. *Veeder* v. *Baker*. 163

2. Notwithstanding the provision of the Code of Civil Procedure (§ 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc. *Taylor* v. *Wing*. 527

3. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. *Briggs* v. *Waldron*. 582

COURTS OF SESSIONS.

1. The provision of the State Constitution (art. 6, § 26), declaring that "courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law" is not limited to offenses of the grade specified, created by statute after the adoption of that provision; it includes as well all such offenses existing by statute at that time, including petit larceny. *People ex rel.* v. *Dutcher*. 240

2. The said provision also was intended to confer authority upon said courts as they were then or might thereafter be constituted by statute, and without regard to the question whether or not they were authorized to summon and impannel a common-law jury. *Id.*

3. The provision, therefore, of the act of 1879 (chap. 390, Laws of 1879), giving to courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offense," is constitutional and valid. *Id.*

4. The Supreme Court has no power to let to bail one charged with such an offense. *Id.*

COVENANTS.

The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out. *Nat. Bk.* v. *Bigler*. 51

CRIMINAL TRIAL.

1. Upon the trial of an indictment for larceny it did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in planning the theft and in learning the situation of the premises and the ways of the keeper thereof. That the one who was in fact engaged in taking the property sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number, and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts. *Held*, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury. *McCarney* v. *People*. 408

2. To constitute one a principal in a felony, he must be present at its commission; his presence, however, may be constructive, and this is established when it is shown that he acted with another in the pursuance of a common design and was so situated as to be able to give aid to his associates with a view to insure the success of the common purpose. *Id.*

3. The letter handed to the watchman, a decoy letter, was received in evidence. *Held*, no error. *Id.*

4. A telegram was offered in evidence on the part of the people; the district attorney stated he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not by further testimony connect the prisoner with it, he "would consent that the message be stricken out." The prisoner's counsel objected that he was not then connected with it, and to the taking of it, "on the promise to strike it out." The objection was overruled. *Held*, no error, that it was a mere question as to the order of proof and within the discretion of the court. *Id.*

5. Also, *held*, that the omission of the court on its own motion to strike out this evidence upon failure of the prosecution to connect the prisoner with it was not error; that it was for the prisoner to ask to have the evidence, if he so desired, stricken out, or to request the court to charge the jury to disregard it, and his omission to do so was a waiver of his right. *Id.*

6. A witness for the prisoner was shown, on cross-examination, a copy of a telegram, and was asked if he received it. This was objected to, as having nothing to do with the trial and as immaterial. The objection was overruled. The telegram was not read or offered in evidence. *Held*, no error. *Id.*

7. The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment. *Hope* v. *People*. 418.

8. It is not a proper plea, therefore, to an indictment that the grand jury received incompetent and irrelevant evidence, to wit: the *ex parte* affidavits taken before the committing magistrate. *Id.*

9. *It seems* that allegations that a grand jury received and considered such affidavits would not be sufficient to sustain a motion to quash the indictment, in the absence of averments or proof that the affidavits were the only evidence or that some fact material to the case of the prosecution was established thereby, or that the witnesses by whom the affidavits were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence. *Id.*

10. Where an indictment contains several counts, some of which are good, the fact that some of the counts are bad does not make a conviction erroneous where the verdict is general. *Id.*

11. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention to return the keys, or that the street door key was ever recovered. *Held*, that the evidence justified the jury in finding a felonious taking of the key from W. against his will and in his presence by violence to his person and by putting him in fear of immediate personal injury, and that such a finding established robbery in the first degree (2 R. S. 677, § 55); that the intent with which they took the key was a question of fact for the jury, and if they found that the robbers took it with intent to appropriate it, the use subsequently made of the key although in the minds of the robbers at the time of the taking could not affect the question of their guilt; and that it was immaterial whether the robbers formed the plan of taking the key before they entered the room or whether it was an after-thought suggested by seeing it on the table. *Id.*

12. Also, *held*, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery. *Id.*

13. Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial. *Id.*

14. Also, *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank *Id.*

15. Upon the trial of an indictment, therefore, charging the accused with obtaining the signature of the mayor of the city of New York to a warrant drawn on its chamberlain by false pretenses, to wit: by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account the mayor testified that he had no distinct recollection of what occurred at the time he signed the warrant, and knew that he signed it simply because his name was affixed to it, it appeared that the bill in question was delivered to him; he was then allowed to testify to the routine of business in his office. *Held*, no error. *People ex rel. Phelps* v. *Oyer and Terminer.* 436

16. It appeared from this evidence that while the mayor did not read or examine each voucher which accompanied the warrants presented to him to sign, he required their presence and was induced to sign by the presence of the bill and by the approval thereof by the proper officers. *Held*, that this authorized the submission of the question to the jury as to whether the presence of the bill was one of the inducements to the signature; that its bare presence although neither examined nor read by the mayor was a false pretense. *Id.*

17. It appeared that a duplicate of the bill was, in accordance with the custom in the municipal offices, prepared and accompanied the original bill when presented to the mayor. *Held*, that this fact and that the duplicate might alone have produced the result, was immaterial, as it was but part and parcel of the false pretense for which the prisoner was responsible. *Id.*

18. A juror was challenged by the prisoner for principal cause and to the favor; he testified in substance that he had read in the newspapers of great frauds perpetrated against the city; that he had read of the prisoner's case and had formed in some degree an opinion in regard thereto, which he had yet, and it would require evidence to remove it; but that his opinion was contingent, founded on an assumption of the truth of what he had read, which he had not investigated; that his opinion was the general impression a man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict and that his previously formed opinion would not bias or affect such verdict, nor would he be influenced at all on the trial thereby; that if put upon the jury he would discard his opinion and decide upon the testimony, and in that event it would not require evidence to overcome his opinion, and he would try the case without being influenced by it. The challenges were overruled and the juror was then challenged peremptorily. After the full number of peremptory challenges had been exhausted another juror was called whom the prisoner's counsel proposed to challenge peremptorily upon the ground that they had been unlawfully compelled to exhaust challenges by the alleged erroneous decision of the court as to the competency of said juror. The court denied the right to further peremptory challenges. *Held*, no error; that if the question could be thus raised, as to which *quære*, the ruling as to competency was correct, and the exhaustion of the peremptory challenges was not compelled by any error of the court. *Id.*

19. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own. *Id.*

20. The range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character. *Id.*

21. Where this limitation has been regarded, this court cannot interfere, save where there has been an abuse of discretion. *Id.*

22. Plaintiff in error was indicted under the provision of the act "to prevent and punish wrongs to children" (§ 4, chap. 122, Laws of 1876), which declares it to be a misdemeanor for one "having the care or custody of any child" to cause or permit the child's life to be endangered or health to be injured, etc. The charge was that the accused willfully neglected to provide the child named, of whom he had the care and custody, with proper and sufficient food, clothing and medicine, thus causing his health to be injured. It appeared, on trial, that the accused was the secretary of a benevolent institution, having a board of trustees, and subject to visitation of the Supreme Court and the State Board of Charities and Corrections. He was, however, in actual charge, provided for the household, and was the director of all its internal affairs, and had the actual care and custody of its inmates. *Held*, that he had the care and custody of the child within the meaning of the statute. *Cowley* v. *People*. 464

23. The court declined to charge that the prisoner had no right to receive and distribute the revenue provided by the legislature for said institution. It did not appear that the ability to supply more and different food or other needful things depended upon that revenue, but it appeared that he had other means in his power to use. *Held*, no error. *Id.*

24. The court charged that if the prisoner took the child into his care and custody, the law imposed upon him the duty of giving him food, clothing, care and medical

attendance reasonably necessary and proper to keep his life from danger and his health from injury. Also, that if he did not have the means to provide what was needful for the child, it was his duty to apply to the public authorities for aid; and that if the prisoner neglected so to do and life was endangered or health injured he was guilty. *Held*, no error. *Id.*

25. One who, with no natural or legal duty voluntarily seeks and assumes the care and custody of a child is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody. *Id.*

26. In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist. *Id.*

27. The indictment charged the offense to be on a day specified; the proof was of continuous acts and omissions in giving the child insufficient food; no one specific act was shown to have been done on any given day. *Held*, that the statute did not require the offense to be made out by proof of an act on any particular day; that the indictment was good averring the offense on a day specified, and proof of repeated and continuous acts or neglects connected in operation resulting in the effect condemned by the statute was sufficient to sustain the indictment. *Id.*

28. The prosecution offered in evidence photographs of the child, one taken before he went to the institution, and others taken about two weeks after he was taken away. It was proved that said photographs were accurate pictures as the child appeared at the times they were taken; also, that the child improved in condition after he was taken from the prisoner's custody and before the last photographs were taken. These were received under a general objection. *Held*, no error. *Id.*

29. Upon the trial of an indictment for keeping a disorderly and common bawdy and gambling house, after the court had charged that if the defendant kept a gambling house where gamblers resorted to play for money, and did so play to the knowledge of defendant, he was guilty, defendant's counsel asked the court to charge that the playing of cards in defendant's house did not, of itself, make it a gambling house. The court, in reply, said, "Except that it is the gambling for money that makes it a disorderly house." *Held*, no error; that the court had properly defined the offense of keeping a gambling house, and its remark clearly referred to a house of that character. *King* v. *People*. 587

See NONSUIT.

CUSTOM.

A custom or usage in a business will not bind the parties to a contract unless it appears they had knowledge of its existence, or that it is so general that they must be presumed to have contracted with reference to it. *Harris* v. *Tumbridge*. 92

DAMAGES.

1. Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase-money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral se-

curity for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. *Kidd* v. *McCormick*. 391

2. Also, *held*, that plaintiff was entitled to recover for expenditures made after the foreclosure sales in completing the buildings. *Id.*

3. Where a right of action for damages which can survive involves, mingled with, but separable from such damages, other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor. *Cregin* v. *Brooklyn Crosstown R. R. Co.* 595

—— *In action against stock-broker when question for jury.*
See Harris v. *Tumbridge.* 92

—— *Measure of, in action for breach of contract by municipal corporation with contractor for work.*
See Baird v. *Mayor.* 254

—— *In action against common carrier for damages to goods, evidence of price at which the damaged goods sold at auction is competent on a question of damages.*
See Guiterman v. *L. N. Y. & P. S. Co.* 588

—— *When defendant in action of ejectment may mitigate damages by offsetting improvements.*
See Wood v. *Wood.* 575

—— *When party accepts the tests of the measure of damages insisted upon by the opposite party and makes proof in accordance therewith, the latter cannot insist that it is not the true measure.*
See Taylor v. *The Mayor (Mem.)* 625

DEBTOR AND CREDITOR.

1. *It seems*, that the right of a debtor making a payment to direct upon which one of several distinct liabilities or demands held by his creditor, it shall be applied, must be exercised at the time of payment; if he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the creditor and he may apply it as he chooses. *Nat. Bk.* v. *Bigler.* 51

2. So, where the debtor assigns property as collateral security generally without dictating upon what demand its proceeds shall be applied, he cannot bind the creditor by any subsequent direction, but the latter may apply such proceeds to any of the demands held by him which are due at the time the money is received. *Id.*

3. Where, in an agreement for an extension of the time of payment made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby. *Id.*

4. Where money is collected by a creditor by the sale of collaterals placed in his hands to secure several distinct items of indebtedness, under such circumstances that neither he nor the debtor possesses the right to determine as to the application, the power devolves upon the court, and it will apply the money upon equitable principles. *Jones* v. *Benedict.* 79

5. W. H. held certain notes and a mortgage as security for an indebtedness of W. F.; the latter was dealing with and was indebted also to F., B. & Co. To secure any balance which might, at any time, be due from W. F. to that firm, W. H. transferred to them said

securities, the same to be returned to him when such balance was paid; afterward W. H. drew drafts upon F., B. & Co. for the benefit of a mining corporation, in which he had no interest, but in which W. F. and the plaintiff were stockholders, W. F. being its superintendent; these drafts were accepted by said firm upon an agreement that the notes and mortgages should be held as security therefor; and, not having been paid at maturity, were taken up by the firm. To procure an extension of the time of payment W. F. executed his notes, payable to his order, which were indorsed by him, by plaintiff and by other stockholders, and were delivered to F., B. & Co. The stockholders, including plaintiff and W. F., subsequently executed an agreement by which each obligated himself to pay his proportionate share of liabilities assumed for the benefit of the corporation. F., B. & Co. recovered judgment upon the stockholders' notes, and subsequently collected, upon the mortgage, a sum sufficient nearly to pay the balance due them from W. F. In an action brought for relief against said judgment, plaintiff claiming that the sum so collected should be applied *pro rata* upon the debts for which the mortgage was held as security, *held*, that whether the application of the money devolved upon the creditor or the court, equity justified its application upon the balance due from W. F. *Id.*

6. *It seems* that one of several original debtors may so contract with the others for their assumption and payment of the common debt, as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor. *Palmer* v. *Purdy*. 144

7. Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety. *Id.*

DECEIT.

1. Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor against the partner making such false representations. *Eaton C. & B. Co.* v. *Avery*. 31

2. A person furnishing information to such an agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him. *Id.*

3. In such an action plaintiff's evidence was to the effect that a person employed by the mercantile agency applied to defendant for a statement of the means of his firm, to be reported to the agency, informing him of the object of his visit; that defendant stated the capital of the firm to be $20,000 chiefly contributed by him, in money, and gave further particulars. The employee reduced the statement to writing and afterward transcribed it on the books of the agency. Defendant subsequently applied to E., plaintiff's president, to sell his firm goods on credit. E., before making the sale, sent to the office of the agency for information as to the responsibility of the firm and received an answer in writing which gave the substance of defendant's statements. This E. examined, and he relied entirely on the report in making the sale. After the failure of defendant to pay, E. exhibited to him the statement; he admitted the making of the representations therein Defendant did not in fact contribute any capital either in money or property; the other partner contributed tools valued at $4,000, of which E. agreed to pay

of the grade of misdemeanors as may be prescribed by law" is not limited to offenses of the grade specified, created by statute after the adoption of that provision; it includes as well all such offenses existing by statute at that time, including petit larceny. *People ex rel. Comaford* v. *Dutcher*. 240

2. The said provision also was intended to confer authority upon said courts as they were then or might thereafter be constituted by statute and without regard to the question whether or not they were authorized to summon and impanel a common-law jury. *Id.*

3. The provision of the act of 1879 (chap. 390, Laws of 1879), giving to courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offense," is constitutional and valid. *Id.*

CONSTRUCTION.

1. In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words where they are in conflict and tend to different results. *Clark* v. *Woodruff*. 518.

2. Where a bond of indemnity given to an officer can reasonably be construed otherwise, a construction will not be given to it which will make the obligors liable for trespasses which they did not direct or authorize. *Id.*

CONTRACT.

1. Plaintiffs' complaint alleged in substance that they were the owners in their own right and in trust for others, with full power of disposal, of certain shares of the stock of the P. R. R. Co.; that an action to foreclose a third mortgage on the road, brought in the interest of the defendant G., who owned a majority of the bonds secured by the mortgage, was pending, which action certain of the stockholders were defending, on the ground that the bonds were collusive and fraudulent; that some of the plaintiffs had filed a petition to come in and defend, when G., with a view to a compromise, promised by letter that in consideration of the relinquishment by plaintiffs and defendant D. of further opposition to the foreclosure, in case he purchased the road on foreclosure sale, he would, upon the plaintiffs organizing a successor company and complying with certain conditions specified, convey the road to them; that plaintiffs performed the preliminary obligations contained in said agreement to be performed on their part, and in consequence G. procured a decree of foreclosure, and a sale of the road was effected; that the decree of foreclosure and sale would not have been made without their co-operation and consent; that after the making of said agreement and in consideration of the surrender of the letter by plaintiffs, and of their consent to a modification of the terms of the agreement, G. agreed that, in case of a sale under the decree, he would become the purchaser, and would forthwith organize a successor company, and convey the road to it, and would deliver to plaintiffs in return for their stock an equal amount of paid-up stock of the new company; that the road was purchased on the foreclosure for the benefit of G., and a new company was organized, to which the property was conveyed, but that G. refused to perform his agreement to issue the new shares in exchange for plaintiffs' stock. Upon demurrer to the complaint, *held*, that its averments were sufficient to constitute a cause of action, that it alleged a sufficient consideration for the original promise of G., and the surrender of the option given thereby to plaintiffs was a sufficient consideration for the substituted agreement. Also, that the averment of a refusal by G. to issue new shares in exchange for the old stock implied a tender

of the old shares. *Marie* v. *Garrison.* 14.

2. It is not essential to the existence of a consideration for a promise that mutuality of obligation should exist between the parties at the time of the making of the promise. *Id.*

3. Where a proposition is made by one party accompanied by a promise, a voluntary performance by another to whom the proposition was made, of the requirements in consideration of the promise, constitutes a consideration which will uphold the promise. and make it binding. *Id.*

4. The agreement was claimed to be unlawful, as a collusive arrangement to establish a fraudulent debt and as calculated to prevent competitive bidding on the foreclosure sale. *Held*, untenable. *Id.*

5. The mere fact that an arrangement entered into by parties having an interest in property about to be sold at public or judicial sale, with honest motives, for the purpose of preserving their interests, may incidentally restrict competition upon such sale, does not render the agreement illegal. *Id.*

6. Plaintiff purchased, through the agency of defendant, a stock option or privilege known as a "straddle," which secured to her the right to demand of the seller, at a price stated, a certain number of shares of a specified stock, or to require him to take said stock at the same price, within sixty days. Plaintiff was induced to make the purchase by printed circulars issued by defendant, explaining the nature of a "straddle," offering to purchase one of his selection upon payment of a specified sum, and guaranteeing that fluctuations in the stock during the pendency of the contract would amount to eight per cent, and in case it did not, agreeing to refund the amount paid, less commissions. Plaintiff authorized defendant, as her agent, to exercise the option. On the next day after the purchase defendant sold the stock "short," which resulted in a loss. Defendant claimed on appeal that this was a gambling transaction, and as such prohibited by statute. No such defense was set up in the answer. *Held*, that the contract was not of necessity a wager contract; that this was for defendant to prove; and that the fact that it might have been so did not dispense with the necessity of proving that it was. *Harris* v. *Tumbridge.* 92

7. Defendant offered evidence that it was common for parties purchasing "straddles" to operate in stock, holding the straddle as security; this was excluded, and the court charged that plaintiff, in order to be bound by any such custom, must have been aware of it. *Held*, no error. *Id.*

8. The department of docks of the city of New York advertised for proposals for furnishing certain iron materials; the notice specified the period of the contract (six months), and stated that the materials must be delivered as called for by the requisitions of the treasurer, and that any bidder "must be engaged in and well prepared for the business." The contract was entered into with plaintiff; in it the quantities of material were stated as "more or less," and it was agreed that the deliveries should be "in such quantities * * * as shall be directed by the treasurer," also that the materials should be furnished "according to the specifications and the requirements of the treasurer under them;" and payments were to be made upon the engineer's certificate that "the quantities have been delivered as per requisition and in accordance with specifications." In the specifications each statement of quantity was followed by the words "more or less." *Held*, that the agreement was not for any definite or fixed quantity of material; but that plaintiff was to deliver and the city only bound to accept what was needed by the department and called for by its official requisi-

tions; and that, therefore, an action to recover damages because of failure to take the quantities stated in the specifications was not maintainable. *Callmeyer* v. *Mayor, etc., of N. Y.* 116

9. In pursuance of an invalid ordinance of the common council, the Croton aqueduct board of the city of New York advertised for proposals for paving a street. On October 15, 1869, the proposals for the work were opened, plaintiff was announced to be the lowest bidder, and the contract was awarded to him. Plaintiff's proposal was accompanied by a bond with sureties as required by the specifications. On December 18, 1869, the common council, by resolution, rescinded the ordinance. Plaintiff thereafter demanded, of the said board, that the contract should be executed, which was refused. In May, 1872, plaintiff presented the papers to the commissioners appointed under the act of 1872 (chap. 580, Laws of 1872), who gave a certificate that there was no fraud in the award. In an action to recover damages; *held*, that the award of the contract by the board was an approval of a sufficiency of the sureties and no other was needed; that the security mentioned in section 38 of the city charter of 1857 (chap. 446, Laws of 1857), which is required to be approved by the comptroller, was that required of the contractor on entering into the formal contract after the award to him, but, *held*, that the ordinance not having been legally passed all subsequent proceedings were invalid and plaintiff acquired no rights under it; that, as previous to the passage of the act of 1872, the ordinance was annulled, there was nothing for the commissioners to act upon; and that, therefore, plaintiff was not entitled to recover. *Baird* v. *Mayor, etc.* 254

10. *It seems*, that had the ordinance, authorizing the work, been valid and the proceedings, prior to opening the bids, regular, plaintiff would have had a valid contract for the breach of which he could have claimed damages (chap. 308, Laws of 1861); and that, having such a contract, it could not be destroyed by the rescission of the ordinance. *Id.*

11. Also, that the quantities mentioned in the specifications were proper to be taken as *prima facie* the amount of work to be done; and that the prices specified in the proposal, less what the work could have been done for, furnished the proper measure of damages. *Id.*

12. Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase-money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral security for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. Plaintiff, before bringing this action, foreclosed his mortgages,

bidding in the premises and obtaining judgments for deficiencies. *Held*, that neither the taking possession and completing the buildings, nor the foreclosures worked a rescission of the contract on the part of plaintiff; also that a reservation of said contract in the foreclosure judgments was not necessary. *Kidd* v. *McCormick*. 391

13. In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words where they are in conflict and tend to different results. *Clark* v. *Woodruff*. 518

14. Plaintiff was employed by the police department in March, 1874, to remove the garbage from the streets at an agreed compensation of $800 per month; the employment terminable at the pleasure of the department, and it was so terminated in July, 1874. Plaintiff's bills were paid for two months. For the residue of the time they were rendered, but not paid. From March, 1874, to January 17, 1877, there was upon the books of the street cleaning bureau of the police department an unexpended balance of appropriations for the year 1874, more than sufficient to pay plaintiff's claim; this was paid into the city treasury on the day last named. Plaintiff duly presented his claim to the comptroller and demanded payment, which demand was not complied with. In an action to recover the balance unpaid, *held*, that the contract for the work was not within the provision of said charter (§ 91), providing that where work is necessary to be done to complete or perfect a particular job for the corporation, involving an expenditure of over $1,000, the same shall be let by contract, after advertisement, to the lowest bidder; as the work here was not done to complete any particular job, and it did not necessarily involve an expenditure of more than $1,000. *Swift* v. *Mayor, etc.* 528

—— *For work in city of New York, validity of.*
See In re Marsh. 431

—— *Validity of, between principal and agent, by which the latter expressly agrees to insure former from loss.*
See Loeb v. *Hellman.* (*Mem.*) 601

——*In an action on contract to build sewers, defendant set up, as a counter-claim, damages for breach of contract in not completing the work. Held, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it, but this did not preclude it from insisting upon the counter-claim.*
See Taylor v. *The Mayor.* (*Mem.*) 625

CONVERSION.

1. The fact of the possession and use by one of two tenants in common of personal property, of the property so held, even though it prevents the possession and use by the other, furnishes no ground to the latter for an action for conversion. *Osborn* v. *Schenck*. 201

2. *It seems*, however, that if the possession develops into a destruction of the property, or of the interest of the co-tenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment, or if it ends in a sale of the whole property, ignoring the rights of such co-tenant, then a conversion is established. *Id.*

3. A purchaser, however, from the co-tenant who has assumed to sell the whole property is not made liable simply from his purchase and claim to be sole owner. *Id.*

4. Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants gave them, as security, a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half, and plaintiff the other half. The payments stipulated in the mortgage were

fixed so as to correspond, in amounts and dates, with the rents reserved in the lease which was looked to, to discharge the mortgage debt. In an action for conversion of plaintiff's interest, *held*, that the taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P.; that the effect of the mortgage was simply to vest the interest of P., upon default, in defendants. *Id.*

5. Defendant H. B. S., after default, removed the machine from the possession of the lessees, claiming a right so to do. It appeared that no demand was made upon him before suit brought, and until after that time he neither did nor said any thing in denial of plaintiff's right as co-tenant. *Held*, that the taking possession was simply the exercise of defendants' rights as co-tenants, and neither made the defendants jointly nor H. B. S. individually liable. *Id.*

CORPORATIONS.

1. Where a stockholder receives from a corporation dividends declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated. *Peckham* v. *Van Wagenen*. 40

2. *It seems* that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company. *Id.*

3. He cannot follow the assets of the company in the hands of parties to whom it has paid them, until, at least, he has established his rights as a creditor of the company, and has exhausted his legal remedies against it. *Id.*

4. The confiscation acts of Congress do not contemplate or authorize the confiscation of the property of a corporation. *Risley* v. *Phenix Bk.* 318

5. One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority. *Alexander* v. *Cauldwell*. 480

6. It cannot be presumed that the agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in. *Id.*

See BRIDGE COMPANIES.
CHARITABLE ASSOCIATIONS.
GAS-LIGHT COMPANIES.
INSURANCE (FIRE).
INSURANCE (LIFE).
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MINING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RAILROAD CORPORATIONS.

COSTS.

The will of R. gave to plaintiffs certain legacies, payable after the debts of the testator had been discharged. Plaintiffs brought this action for an accounting by certain of the defendants, as executors and trustees under said will, and for a payment of the amount found due, out of the property in their hands; or, if this proved insufficient, out of the real estate in the hands of the other defendants, "so far as the same might be applicable." The referee found that the testator was insolvent, that the real estate in question was sold to pay debts and the complaint was dismissed. Defendants appeared by different attorneys, and an extra allowance of costs was made to each. *Held*, error; that the facts furnished no basis on which an extra allowance could be computed under the provision of the Code of Civil Procedure in reference thereto (§ 309), as there was no "recovery," or "claim" for the payment of any fixed sum and "the subject-matter involved'

was plaintiffs' interest when ascertained, which proved to be nothing. *Weaver* v. *Ely*. 89

—— *An attorney's lien on judgment for costs can only be asserted by him; until so asserted judgment belongs to plaintiff and may be attached.* *See Wehle* v. *Conner*. 231

COUNTER-CLAIM.

—— *In an action on contract to build sewers, defendant set up as a counter-claim, damages for breach of contract in not completing the work. Held, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it, but this did not preclude it from insisting upon the counter-claim. Taylor* v. *The Mayor*. (*Mem.*) 625

COUNTIES.

A municipal corporation or a county has the power to lease real estate when the use thereof is needed to carry out any of its acknowledged powers and purposes. *Davies* v. *Mayor, etc.* 207

COURTS.

See COURT OF APPEALS.
COURTS OF SESSIONS.
SUPREME COURT.
SURROGATE'S COURT.

COURT OF APPEALS.

When, during the pendency of an appeal to this court from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order. *Veeder* v. *Baker*. 163

2. Notwithstanding the provision of the Code of Civil Procedure (§ 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc. *Taylor* v. *Wing*. 527

3. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. *Briggs* v. *Waldron*. 582

COURTS OF SESSIONS.

1. The provision of the State Constitution (art. 6, § 26), declaring that "courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law" is not limited to offenses of the grade specified, created by statute after the adoption of that provision; it includes as well all such offenses existing by statute at that time, including petit larceny. *People ex rel.* v. *Dutcher*. 240

2. The said provision also was intended to confer authority upon said courts as they were then or might thereafter be constituted by statute, and without regard to the question whether or not they were authorized to summon and impannel a common-law jury. *Id.*

3. The provision, therefore, of the act of 1879 (chap. 390, Laws of 1879), giving to courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offense," is constitutional and valid. *Id.*

4. The Supreme Court has no power to let to bail one charged with such an offense. *Id.*

COVENANTS.

The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out. *Nat. Bk.* v. *Bigler*. 51

CRIMINAL TRIAL.

1. Upon the trial of an indictment for larceny it did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in planning the theft and in learning the situation of the premises and the ways of the keeper thereof. That the one who was in fact engaged in taking the property sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number, and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts. *Held*, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury. *McCarney* v. *People*. 408

2. To constitute one a principal in a felony, he must be present at its commission; his presence, however, may be constructive, and this is established when it is shown that he acted with another in the pursuance of a common design and was so situated as to be able to give aid to his associates with a view to insure the success of the common purpose. *Id.*

3. The letter handed to the watchman, a decoy letter, was received in evidence. *Held*, no error. *Id.*

4. A telegram was offered in evidence on the part of the people; the district attorney stated he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not by further testimony connect the prisoner with it, he "would consent that the message be stricken out." The prisoner's counsel objected that he was not then connected with it, and to the taking of it, "on the promise to strike it out." The objection was overruled. *Held*, no error, that it was a mere question as to the order of proof and within the discretion of the court. *Id.*

5. Also, *held*, that the omission of the court on its own motion to strike out this evidence upon failure of the prosecution to connect the prisoner with it was not error; that it was for the prisoner to ask to have the evidence, if he so desired, stricken out, or to request the court to charge the jury to disregard it, and his omission to do so was a waiver of his right. *Id.*

6. A witness for the prisoner was shown, on cross-examination, a copy of a telegram, and was asked if he received it. This was objected to, as having nothing to do with the trial and as immaterial. The objection was overruled. The telegram was not read or offered in evidence. *Held*, no error. *Id.*

7. The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment. *Hope* v. *People*. 418.

8. It is not a proper plea, therefore, to an indictment that the grand jury received incompetent and irrelevant evidence, to wit: the *ex parte* affidavits taken before the committing magistrate. *Id.*

9. *It seems* that allegations that a grand jury received and considered such affidavits would not be sufficient to sustain a motion to quash the indictment, in the absence of averments or proof that the affidavits were the only evidence or that some fact material to the case of the prosecution was established thereby, or that the witnesses by whom the affidavits were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence. *Id.*

10. Where an indictment contains several counts, some of which are good, the fact that some of the counts are bad does not make a conviction erroneous where the verdict is general. *Id.*

11. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention to return the keys, or that the street door key was ever recovered. *Held*, that the evidence justified the jury in finding a felonious taking of the key from W. against his will and in his presence by violence to his person and by putting him in fear of immediate personal injury, and that such a finding established robbery in the first degree (2 R. S. 677, § 55); that the intent with which they took the key was a question of fact for the jury, and if they found that the robbers took it with intent to appropriate it, the use subsequently made of the key although in the minds of the robbers at the time of the taking could not affect the question of their guilt; and that it was immaterial whether the robbers formed the plan of taking the key before they entered the room or whether it was an after-thought suggested by seeing it on the table. *Id.*

12. Also, *held*, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery. *Id.*

13. Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial. *Id.*

14. Also, *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank. *Id.*

15. Upon the trial of an indictment, therefore, charging the accused with obtaining the signature of the mayor of the city of New York to a warrant drawn on its chamberlain by false pretenses, to wit: by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account the mayor testified that he had no distinct recollection of what occurred at the time he signed the warrant, and knew that he signed it simply because his name was affixed to it, it appeared that the bill in question was delivered to him; he was then allowed to testify to the routine of business in his office. *Held*, no error. *People ex rel. Phelps* v. *Oyer and Terminer.* 436

16. It appeared from this evidence that while the mayor did not read or examine each voucher which accompanied the warrants presented to him to sign, he required their presence and was induced to sign by the presence of the bill and by the approval thereof by the proper officers. *Held*, that this authorized the submission of the question to the jury as to whether the presence of the bill was one of the inducements to the signature; that its bare presence although neither examined nor read by the mayor was a false pretense. *Id.*

17. It appeared that a duplicate of the bill was, in accordance with the custom in the municipal offices, prepared and accompanied the original bill when presented to the mayor. *Held*, that this fact and that the duplicate might alone have produced the result, was immaterial, as it was but part and parcel of the false pretense for which the prisoner was responsible. *Id.*

18. A juror was challenged by the prisoner for principal cause and to the favor; he testified in substance that he had read in the newspapers of great frauds perpetrated against the city; that he had read of the prisoner's case and had formed in some degree an opinion in regard thereto, which he had yet, and it would require evidence to remove it; but that his opinion was contingent, founded on an assumption of the truth of what he had read, which he had not investigated; that his opinion was the general impression a man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict and that his previously formed opinion would not bias or affect such verdict, nor would he be influenced at all on the trial thereby; that if put upon the jury he would discard his opinion and decide upon the testimony, and in that event it would not require evidence to overcome his opinion, and he would try the case without being influenced by it. The challenges were overruled and the juror was then challenged peremptorily. After the full number of peremptory challenges had been exhausted another juror was called whom the prisoner's counsel proposed to challenge peremptorily upon the ground that they had been unlawfully compelled to exhaust challenges by the alleged erroneous decision of the court as to the competency of said juror. The court denied the right to further peremptory challenges. *Held*, no error; that if the question could be thus raised, as to which *quære*, the ruling as to competency was correct, and the exhaustion of the peremptory challenges was not compelled by any error of the court. *Id.*

19. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own. *Id.*

20. The range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character. *Id.*

21. Where this limitation has been regarded, this court cannot interfere, save where there has been an abuse of discretion. *Id.*

22. Plaintiff in error was indicted under the provision of the act "to prevent and punish wrongs to children" (§ 4, chap. 122, Laws of 1876), which declares it to be a misdemeanor for one "having the care or custody of any child" to cause or permit the child's life to be endangered or health to be injured, etc. The charge was that the accused willfully neglected to provide the child named, of whom he had the care and custody, with proper and sufficient food, clothing and medicine, thus causing his health to be injured. It appeared, on trial, that the accused was the secretary of a benevolent institution, having a board of trustees, and subject to visitation of the Supreme Court and the State Board of Charities and Corrections. He was, however, in actual charge, provided for the household, and was the director of all its internal affairs, and had the actual care and custody of its inmates. *Held*, that he had the care and custody of the child within the meaning of the statute. *Cowley* v. *People*. 464

23. The court declined to charge that the prisoner had no right to receive and distribute the revenue provided by the legislature for said institution. It did not appear that the ability to supply more and different food or other needful things depended upon that revenue, but it appeared that he had other means in his power to use. *Held*, no error. *Id.*

24. The court charged that if the prisoner took the child into his care and custody, the law imposed upon him the duty of giving him food, clothing, care and medical

attendance reasonably necessary and proper to keep his life from danger and his health from injury. Also, that if he did not have the means to provide what was needful for the child, it was his duty to apply to the public authorities for aid; and that if the prisoner neglected so to do and life was endangered or health injured he was guilty. *Held*, no error. *Id.*

25. One who, with no natural or legal duty voluntarily seeks and assumes the care and custody of a child is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody. *Id.*

26. In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist. *Id.*

27. The indictment charged the offense to be on a day specified; the proof was of continuous acts and omissions in giving the child insufficient food; no one specific act was shown to have been done on any given day. *Held*, that the statute did not require the offense to be made out by proof of an act on any particular day; that the indictment was good averring the offense on a day specified, and proof of repeated and continuous acts or neglects connected in operation resulting in the effect condemned by the statute was sufficient to sustain the indictment. *Id.*

28. The prosecution offered in evidence photographs of the child, one taken before he went to the institution, and others taken about two weeks after he was taken away. It was proved that said photographs were accurate pictures as the child appeared at the times they were taken; also, that the child improved in condition after he was taken from the prisoner's custody and before the last photographs were taken. These were received under a general objection. *Held*, no error. *Id.*

29. Upon the trial of an indictment for keeping a disorderly and common bawdy and gambling house, after the court had charged that if the defendant kept a gambling house where gamblers resorted to play for money, and did so play to the knowledge of defendant, he was guilty, defendant's counsel asked the court to charge that the playing of cards in defendant's house did not, of itself, make it a gambling house. The court, in reply, said, "Except that it is the gambling for money that makes it a disorderly house." *Held*, no error; that the court had properly defined the offense of keeping a gambling house, and its remark clearly referred to a house of that character. *King* v. *People*. 587

See NONSUIT.

CUSTOM.

A custom or usage in a business will not bind the parties to a contract unless it appears they had knowledge of its existence, or that it is so general that they must be presumed to have contracted with reference to it. *Harris* v. *Tumbridge*. 92

DAMAGES.

1. Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase-money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral se-

curity for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. *Kidd* v. *McCormick.* 391

2. Also, *held*, that plaintiff was entitled to recover for expenditures made after the foreclosure sales in completing the buildings. *Id.*

3. Where a right of action for damages which can survive involves, mingled with, but separable from such damages, other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor. *Cregin* v. *Brooklyn Crosstown R. R. Co.* 595

—— *In action against stock-broker when question for jury.*
See Harris v. *Tumbridge.* 92

—— *Measure of, in action for breach of contract by municipal corporation with contractor for work.*
See Baird v. *Mayor.* 254

—— *In action against common carrier for damages to goods, evidence of price at which the damaged goods sold at auction is competent on a question of damages.*
See Guiterman v. *L. N. Y. & P. S. Co.* 588

—— *When defendant in action of ejectment may mitigate damages by offsetting improvements.*
See Wood v. *Wood.* 575

—— *When party accepts the tests of the measure of damages insisted upon by the opposite party and makes proof in accordance therewith, the latter cannot insist that it is not the true measure.*
See Taylor v. *The Mayor (Mem.)* 625

DEBTOR AND CREDITOR.

1. *It seems*, that the right of a debtor making a payment to direct upon which one of several distinct liabilities or demands held by his creditor, it shall be applied, must be exercised at the time of payment; if he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the creditor and he may apply it as he chooses. *Nat. Bk.* v. *Bigler.* 51

2. So, where the debtor assigns property as collateral security generally without dictating upon what demand its proceeds shall be applied, he cannot bind the creditor by any subsequent direction, but the latter may apply such proceeds to any of the demands held by him which are due at the time the money is received. *Id.*

3. Where, in an agreement for an extension of the time of payment made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby. *Id.*

4. Where money is collected by a creditor by the sale of collaterals placed in his hands to secure several distinct items of indebtedness, under such circumstances that neither he nor the debtor possesses the right to determine as to the application, the power devolves upon the court, and it will apply the money upon equitable principles. *Jones* v. *Benedict.* 79

5. W. H. held certain notes and a mortgage as security for an indebtedness of W. F.; the latter was dealing with and was indebted also to F., B. & Co. To secure any balance which might, at any time, be due from W. F. to that firm, W. H. transferred to them said

securities, the same to be returned to him when such balance was paid; afterward W. H. drew drafts upon F., B. & Co. for the benefit of a mining corporation, in which he had no interest, but in which W. F. and the plaintiff were stockholders, W. F. being its superintendent; these drafts were accepted by said firm upon an agreement that the notes and mortgages should be held as security therefor; and, not having been paid at maturity, were taken up by the firm. To procure an extension of the time of payment W. F. executed his notes, payable to his order, which were indorsed by him, by plaintiff and by other stockholders, and were delivered to F., B. & Co. The stockholders, including plaintiff and W. F., subsequently executed an agreement by which each obligated himself to pay his proportionate share of liabilities assumed for the benefit of the corporation. F., B. & Co. recovered judgment upon the stockholders' notes, and subsequently collected, upon the mortgage, a sum sufficient nearly to pay the balance due them from W. F. In an action brought for relief against said judgment, plaintiff claiming that the sum so collected should be applied *pro rata* upon the debts for which the mortgage was held as security, *held*, that whether the application of the money devolved upon the creditor or the court, equity justified its application upon the balance due from W. F. *Id.*

6. *It seems* that one of several original debtors may so contract with the others for their assumption and payment of the common debt, as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor. *Palmer* v. *Purdy*. 144

7. Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety. *Id.*

DECEIT.

1. Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor against the partner making such false representations. *Eaton C. & B. Co.* v. *Avery*. 31

2. A person furnishing information to such an agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him. *Id.*

3. In such an action plaintiff's evidence was to the effect that a person employed by the mercantile agency applied to defendant for a statement of the means of his firm, to be reported to the agency, informing him of the object of his visit; that defendant stated the capital of the firm to be $20,000 chiefly contributed by him, in money, and gave further particulars. The employee reduced the statement to writing and afterward transcribed it on the books of the agency. Defendant subsequently applied to E., plaintiff's president, to sell his firm goods on credit. E., before making the sale, sent to the office of the agency for information as to the responsibility of the firm and received an answer in writing which gave the substance of defendant's statements. This E. examined, and he relied entirely on the report in making the sale. After the failure of defendant to pay, E. exhibited to him the statement; he admitted the making of the representations therein Defendant did not in fact contribute any capital either in money or property; the other partner contributed tools valued at $4,000, of which E. agreed to pay

half but did not. E., about the time he made the statement, advised his partner that he was going to the agency to put this property in the name and to the credit of the firm, and afterward stated to him that he had valued the firm at $25,000. *Held*, that the evidence justified a refusal to nonsuit; that it authorized a finding that the alleged false statement as to capital was made to give the firm a credit it was not entitled to, and with intent to defraud any person who might inquire of the agency. *Id.*

4. The commercial agency in its answer added to the statement as to what defendant had represented a caution to the effect that it did not confirm it, that the claims of the firm for credit were not yet established, and that "small amounts should rule, though so far have paid as agreed." *Held*, that it was for the jury to determine, and defendant was entitled to have them instructed that they might take into consideration whether the representations were such as were calculated under the circumstances to deceive a prudent man. *Id.*

DEED.

1. Where a person, with intent to convey title, executes a conveyance of property in a name not his own, he is bound by the name he thus adopts, which will be considered as his name *pro hac vice*, and the conveyance is effectual to vest title in the grantee. *David* v. *Williamsburgh City F. Ins. Co.* 265

2. In an action upon a policy of fire insurance, upon real and personal property, the defense was that, at the time of the insurance and of the loss, the property did not belong to plaintiff. Defendant's evidence was to the effect that H., who was then the owner, conveyed the property in form to M., a fictitious person, and then in the name of M. he conveyed it to plaintiff. The court charged the jury, in substance, that if they believed there was no such person as M., or that he never executed the conveyance, they must find for defendant. *Held*, error; that, as it was to be assumed the conveyances were executed by H. with the intention of vesting title in plaintiff to whom they were delivered, and who the proof tended to show took and held possession of the property, although the conveyance to M., there being no such person, was invalid, yet the conveyance in the name of M. to plaintiff was valid as against H., and the plaintiff showed sufficient title to maintain her action. *Id.*

DEFAULT.

A judgment of affirmance by default of the General Term is not reviewable here. *Htevens* v. *Glover*. 611

DEFENSE.

1. Where separate purchas f goods are made at different times upon a credit for a specified time, the different sales do not constitute an entire and indivisible demand, but a cause of action accrues when the term of credit expires as to any one sale, and the vendor may bring separate actions for each sale. *Zimmerman* v. *Erhard*. 74

2. The pendency of an action, therefore, to recover for goods so sold at one date is not a defense to an action for goods sold at a subsequent date. *Id.*

—— *Twenty years' adverse possession, good defense to action of ejectment brought by a married woman.* *See Clarke* v. *Gibbons*. 107

DEFINITIONS.

1. Plaintiff was appointed an attendant of the Supreme Court by the board of supervisors of the county of New York, under the provision of the Code of Procedure (§ 28), requiring the "supervisors of the several counties" to provide the courts appointed to be held therein, with * * * attendants, * * * suitable and sufficient for the transaction of their business. *Held*, that he was "in office" within the

meaning of the provision of the act of 1870 (§ 3, chap. 382, Laws of 1870), in reference to said county, which prohibits the board of supervisors of said county from "increasing the salaries of those now in office, or their successors;" and that, therefore, an ordinance of said board increasing plaintiff's salary was illegal and void. *Rowland* v. *Mayor, etc.* 372

2. The charter of the city of Troy (§ 10, chap. 129, Laws of 1872) provides that no civil action shall be brought against the city for injuries to person or property "unless it appears that the claim for which the action was brought was presented to the comptroller with an abstract of the facts out of which the cause of action arose, * * * and that the comptroller did not, within sixty days, audit the same." Plaintiff presented a petition, as required, setting forth the facts and claiming damages to the amount of $10,000 for injuries alleged to have been caused by the negligent omission of the city to keep one of its streets in repair. The claim not having been audited as prescribed, this action was brought. The complaint alleged, substantially, the same facts as the petition and claimed $5,000 damages. *Held*, that the word "claim," and the phrase "cause of action," related to the same thing; that although the amount of compensation was different, the claim presented in the petition and the cause of action set forth in the complaint were identical; and that there was a sufficient compliance with the provisions of the charter. *Minick* v. *City of Troy.* 514

DEMURRER.

—— *Remedy for indefiniteness in pleadings is by motion not demurrer. See Marie* v. *Garrison.* 14

DEPOSITIONS.

1. The power of the court to award a commission, without the consent of parties, to take the testimony of a witness out of the State depends entirely on statute, and can only be exercised in the cases therein specified. *In re an Attorney.* 164

2. The provisions of the Code of Civil Procedure in reference to taking depositions out of the State (§§ 887 *et seq.*), relate to actions only. *Id.*

DISORDERLY HOUSE.

1. It is not an essential element of the offense of keeping a disorderly house that the public should be disturbed by noise; the keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house. *King* v. *People.* 587

2. When the house of a person is the resort of prostitutes, plying their vocation, with his knowledge, this constitutes a bawdy house. *Id.*

3. Upon the trial of an indictment for keeping a disorderly and common bawdy and gambling house, after the court had charged that if the defendant had kept a gambling house, where gamblers resorted to play for money, and did so play to the knowledge of defendant, he was guilty, defendant's counsel asked the court to charge that the playing of cards in defendant's house did not, of itself, make it a gambling house. The court, in reply, said, "Except that it is the gambling for money that makes it a disorderly house." *Held*, no error; that the court had properly defined the offense of keeping a gambling house, and its remark clearly referred to a house of that character. *Id.*

EASEMENTS.

1. The bed and banks of a fresh water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any

way not inconsistent with this easement. *Chenango Bridge Co.* v. *Paige.* 178.

2. The legislature, except under the power of eminent domain, can interfere with such a river only for the purpose of regulating, preserving and protecting the public easement. *Id.*

EJECTMENT.

1. In 1844 certain premises were conveyed to plaintiff, a married woman, for life, as and for her own separate estate, free from the control of her husband, her husband covenanting for a consideration expressed that she should hold the premises to her own separate and sole use, free from any claim or interference from him. In an action to recover possession of the premises, brought against the husband and his tenant, *held*, that under the law as it existed when the deed was executed, plaintiff could, in equity, enjoy the property separate from her husband; that a trustee was not required to be named in the instrument, as in case of such omission the law created the husband a trustee for the wife; that the effect of the acts in relation to married women (chap. 200, Laws of 1848; chap. 375, Laws of 1849; chap. 90, Laws of 1860; chap. 172, Laws of 1862) was to change her equitable right to hold a separate estate into a legal estate, to give her the right of control and management the same as if she were a *feme sole*; that there was no occasion for her to resort to the Supreme Court, under the act of 1849 (§ 2), for the resignation and surrender of the trustee and a conveyance to her; and that, as, by the said acts, she was given the power to sue and be sued, she could maintain the action. *Wood* v. *Wood.* 575

2. Also, *held*, that as it appeared that the husband had not acquired possession by the consent of the plaintiff, he was not entitled to notice to quit. *Id.*

3. Also, *held*, that the fact that the defendant had put valuable improvements upon the land was no defense to the action. *Id.*

4. *It seems* that one who has put improvements upon the land of another is at the best only allowed to thereby mitigate the damages by offsetting them to the extent of the rents and profits claimed. To do this he must be a *bona fide* occupant; he cannot be allowed them if he has acted with knowledge of the owner's right. *Id.*

—— *Twenty years' adverse possession good defense to action of ejectment brought by a married woman.*
See Clarke v. *Gibbons.* 107

ESTOPPEL.

Where a common carrier performs his contract to transport and deliver goods, a payment of the freight or a submission to judgment therefor does not preclude the owner of the goods from recovering damages for injuries thereto while *en route;* he may pay the freight and sue for the damages, or set up his damages by way of counter-claim in an action to recover the freight, or he may bring a cross-action. *Schwinger* v. *Raymond.* 192

—— *When insurance company not estopped from claiming breach of warranty.*
See Devens v. *M. & T. Ins. Co.* 168

EVIDENCE.

1. Where in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defense of payment is interposed, the non-production of the bond by the plaintiff is evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover. *Bergen* v. *Urbahn.* 49

2. In an action to recover the amount of a check drawn by C., plaintiff's

assignor, to the order of defendant, and alleged to have been delivered to the latter to be used in purchasing a draft for the drawee, the defendant averred in his answer that the check was intended as a payment in part of a claim which C. "morally owed" the defendant, growing out of a fraud perpetrated by C. in inducing defendant to take a fraudulent note; the alleged facts in reference thereto being set forth in the answer, which also averred that defendant settled the claim with C. on his promise that he would at some time pay the loss. On the trial, after L., as a witness for plaintiff, had testified that the check was given to purchase a draft, defendant's counsel sought to show by him, on cross-examination, the facts of the fraud set forth in the answer; this was objected to and the evidence excluded. After defendant, as a witness in his own behalf, had testified that the check was given as a payment upon the claim arising out of the fraudulent note, his counsel offered to prove by him the transaction in regard to said note substantially as alleged in the answer. This was objected to and excluded. Before the court ruled upon the offer it was conceded that a release under seal, which was produced, was executed by defendant with full knowledge of the facts; the release recited that in consideration of the agreement of the other parties to indemnify defendant from the debts of a firm named during the time he was a member he released C. from all demands "by way of checks, notes or otherwise." *Held*, that the evidence offered was properly rejected; that evidence of the details of the fraud could not legitimately tend to confirm defendant's version. *Canaday* v. *Krum*. 67

3. The evidence upon the cross-examination of C. was also offered, for the purpose of discrediting him. *Held*, that the rejection thereof for that purpose was in the discretion of the court, and so was not error. *Id.*

4. Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable. A witness was asked by plaintiff's counsel, whether the switch was as high at the time of the trial as at the time of the accident; this was objected to and objection overruled. *Held*, no error. *Wooley* v. *Grand St., etc., R. R. Co.* 121

5. Also, *held*, that it was not error to receive evidence that there had been other accidents at the same switch. *Id.*

6. After a witness has testified to facts showing that he has some knowledge of the cost or value of buildings, acquired as a dealer or builder, his testimony as to the value of a building is competent. *Woodruff* v. *Imp. F. Ins. Co.* 133

7. Plaintiff offered to prove that there was a conspiracy between the attachment creditors, the judgment debtors and the sheriff, to issue the attachment "for the purpose of preventing the collection of plaintiff's judgment." *Held*, that the offer was properly excluded; that the fact that there was a conspiracy to do what the law authorizes did not affect the legality of the act. *Wehle* v. *Conner*. 231

8. In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act (§ 10, chap. 140, Laws of 1850, as amended by chap. 282, Laws of 1854), making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's *status* as a creditor and of the amount due him. *Stephens* v. *Fox*. 313

9. The effect of said provision is not to impose any penalty or original liability upon the stockholder, but simply to confer upon the creditor of the corporation a right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription. The creditor claims through the corporation, and if he shows that he is a creditor, by evidence binding and conclusive against it, the evidence is competent against the stockholder. *Id.*

10. In such an action, on trial before a referee, after the case was closed it was reopened by order of the court for the sole purpose of allowing defendant to put in evidence certain exhibits and records; on the rehearing, defendant offered oral evidence to sustain a counter-claim. *Held*, that it was properly excluded. *Id.*

11. In an action against a common carrier by sea to recover damages for injuries to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the protest and some of the testimony and the evidence covering a great variety of facts, a witness called as an expert by plaintiff, after having testified that he had heard the testimony read to the jury the previous day, and the protest and had heard the testimony of one or two of the witnesses and the circumstances as detailed by them, was asked "under the circumstances detailed by these witnesses and in the protest," and under certain circumstances which were specified, "what in your opinion should have been done by the persons in charge of the steamship?" *Held*, incompetent. *Guiterman* v. *Liv. N. Y., etc., Co.* 358

12. The goods damaged were sold at public auction. *Held*, that evidence of the prices brought was competent as tending to show value, and upon the question of damages. *Id.*

13. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of one dollar, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. *Held*, that evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery. *Hope* v. *People*. 418

14. Upon the trial of an indictment evidence of the commission of another crime by the prisoner is competent where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial. *Id.*

15. Also, *held*, that evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank. *Id.*

16. Photographic pictures when shown to be correct resemblances of the person or thing represented are competent as evidence. *Cowley* v. *People*. 465

17. Plaintiffs, who were bankers, loaned to B. Bros. & H. $10,000, upon the specific pledge of a quantity of whisky; this loan was paid in full. Prior and subsequent to this loan plaintiffs made other advances to said firm to a

large amount. The whisky was levied on by B., defendant's testator, then sheriff, under attachments, against M. On the trial of an action to recover possession of the whisky, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whisky was the property of M.; this evidence was excluded. *Held*, error, that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them. *Duncan* v. *Brennan*. 487

18. Oral testimony, or writings of a testator not attested as a will, showing a contrary intent from that expressed by the plain terms of the will, are incompetent as evidence and ineffectual to change those terms. *Williams* v. *Freeman*. 561

19. The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will. *Id.*

—— *When evidence of custom or usage properly excluded.*
See Harris v. *Tumbridge*. 92

—— *When admissions of treasurer of a corporation not competent in action against a trustee to recover a debt because of failure to file annual report.*
See Alexander v. *Cauldwell*. 480

—— *Stipulation that copies of letters might be produced with affidavit of mailing with same effect as original, and that party would not controvert contents of letters thus proved does not preclude the party from showing that the letters were not received.*
See Lockwood v. *Quackenbush*. (*Mem.*) 607

EXCEPTIONS.

—— *Filed after decision of cause, tried by the court, to a failure of the court to decide question raised on trial, not available.*
See Hand v. *Kennedy*. 149

EXECUTION.

—— *Unauthorized levy and sale under execution what does not amount to ratification so as to bind obligors in bond of indemnity.*
See Clark v. *Woodruff*. 518

EXECUTORS AND ADMINISTRATORS.

1. One of several executors has no authority to borrow money without the assent of the others, and such assent is not to be assumed from the fact that the loan was for the benefit of the estate. *Bryan* v. *Stewart*. 270

2. In an action to recover for moneys alleged to have been loaned to the defendants, it appeared that defendants were executors of an estate, certain lots belonging to which were advertised for sale. Plaintiff's transactions were with defendant F., alone, and it did not appear that the other defendants gave any directions in regard to the loans, or ever promised to pay them. The referee found that the business relating to such sale was, with the assent of defendants, conducted by F., who disbursed large sums on account of the expenses of sale; that plaintiff advanced to him, for the purpose of defraying expenses, the sums mentioned in the complaint, and, as matter of law, said referee found that said advances were for the benefit and at the request of all the defendants, and that they were liable. *Held*, that the conclusions of law were not authorized by the findings of fact; that from the facts that F. conducted the business, and that plaintiff advanced moneys to defray expenses, it did not follow as a necessary or logical result that defendants reaped any benefit there from, or requested plaintiff to make the advances. *Id.*

3. Where, upon application for letters of administration with the will annexed, it appears that there are no assets, or the presumption arises from lapse of time that there are no assets of the testator in ex-

istence which can be identified and reached by the administrator, and there is no claim in respect to them which can be enforced, and no other reason appears, the granting of letters cannot be claimed as a matter of right, and the application may be properly refused. *Van Giessen* v. *Bridgford*. 348

4. An executor of a will is a competent witness to prove its due execution although not a subscribing witness. *Rugg* v. *Rugg*. 592

EXPERTS.

1. It is not the province of a witness, testifying as an expert, to draw inferences from the evidence of other witnesses, unless the facts testified to are clear, and uncontroverted, or to take into consideration such facts as he can recollect that have been testified to, and thus form an opinion; but he should have full information of the ascertained or supposed state of facts upon which his opinion is based. *Guiterman* v. *Liv., N. Y., etc., Co.* 358

2. Where the facts are controverted or are not entirely clear a hypothetical question may be put, based upon the facts claimed to have been proved. *Id.*

3. In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist. *Cowley* v. *People*. 464

FALSE PRETENSES.

1. In an indictment under the statute for obtaining a signature to a written instrument under false pretenses, it is not essential to set forth all the details of the fraud, it is sufficient to specify particularly the pretenses, to aver their falsity and the fraudulent intent, and to show how they were effectual in accomplishing the fraud. *People ex rel. Phelps* v. *Oyer and Terminer*. 436

2. If the false pretense averred and proved is capable of defrauding, it is sufficient, and this must be determined by the circumstances of each particular case. *Id.*

3. Such an indictment may be based upon a false claim of indebtedness against a municipal corporation; and if it appear that the claim was presented under circumstances and in such manner as was calculated to deceive the municipal officer whose duty it was to act thereon, and that his signature was thus procured, a conviction will be sustained. *Id.*

4. The question in such case whether the false pretense was calculated to deceive and was capable of defrauding is one for the jury. *Id.*

5. In an indictment, therefore, charging the accused with obtaining the signature of the mayor of the city of New York to a warrant drawn on its chamberlain by false pretenses, to wit: by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account, and that the city was justly indebted to the person in whose name the account was presented against the city. *Held*, that it was not necessary to set forth how the fraudulent account operated to deceive through the action of the intermediate agents of the corporation; that the manner in which the false representation reached the mayor was matter of detail belonging properly to the evidence on trial. *Id.*

6. Upon the trial the mayor testified that he had no distinct recollection of what occurred at the time he signed the warrant, and knew that he signed it simply because his name was affixed to it, it appeared that the bill in question was delivered to him; he was then allowed to testify to the routine of business in his office. *Held*, no error. *Id.*

7. It appeared from this evidence that while the mayor did not read or examine each voucher which

accompanied the warrants presented to him to sign, he required their presence and was induced to sign by the presence of the bill and by the approval thereof by the proper officers. *Held*, that this authorized the submission of the question to the jury as to whether the presence of the bill was one of the inducements to the signature; that its bare presence although neither examined nor read by the mayor was a false pretense. *Id.*

8. It is not necessary to sustain a conviction in such case, that the false pretense was the sole inducement to the act of the party defrauded. *Id.*

9. Nor is it material that the bill went through the hands of other and independent officers before reaching the mayor, who might have stopped its progress; and this whether they were misled by the fraud of the accused or obeyed his orders. *Id.*

10. It is not necessary that words should be spoken or written to create a false representation; a mute or silent act may convey the falsehood, and if it does, it constitutes the offense. *Id.*

11. It appeared that a duplicate of the bill was, in accordance with the custom in the municipal offices, prepared and accompanied the original bill when presented to the mayor. *Held*, that this fact and that the duplicate might alone have produced the result was immaterial, as it was but part and parcel of the false pretense for which the prisoner was responsible. *Id.*

FALSE REPRESENTATIONS.

See DECEIT.

FEES.

—— Of referee, how collected. *Geib* v. *Topping*. 46

FERRIES.

1. Any person owning land on both sides of a fresh water river may without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement. *Chenango Bridge Co.* v. *Paige*. 178

2. Such owner, however, cannot, without legislative authority, maintain a bridge or ferry for public use. *Id.*

FICTITIOUS NAMES.

1. The provision of the act of 1833 (chap. 281, Laws of 1833) in reference to transacting business under fictitious names, which prohibits a person from transacting business in the name of a partner not interested in the business, and which requires that where "& Co." is used it shall represent an actual partner, does not apply to or include the use of the real name of an actual partner, although such a partner is under a disability at the time. *Zimmerman* v. *Erhard*. 74

2. Where a firm is composed of a husband and wife, the latter being represented by the "& Co." in the firm name, in the absence of any intention to impose upon the public by obtaining undue credit, and conceding that a married woman cannot be a partner of her husband, this is not a violation of the statute, prohibiting the doing of business under fictitious names (chap. 281, Laws of 1833). *Id.*

3. Where a person, with intent to convey title, executes a conveyance of property in a name not his own, he is bound by the name he thus adopts, which will be considered as his name *pro hac vice*, and the conveyance is effectual to vest title in the grantee. *David* v. *Williamsburgh City Fire Ins. Co.* 264

FINDINGS OF LAW AND FACT.

1. Where the findings of fact, by a

referee, conflict, the defeated party is entitled to those most favorable to him and may rely upon them in aid of exceptions to the referee's conclusions of law. *Schwinger* v. *Raymond.* 192

2. Where findings contained in the case, as settled by a referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand. (Code of Civil Procedure, § 997.) *Id.*

3. This action was brought to recover freight agreed to be paid for transporting 200 barrels of beans on the deck of a canal boat to New York. Defendants' answer admitted the agreement to pay the freight and the transportation, but alleged that, through the negligence of the plaintiff, the beans were wet and damaged, and asked judgment for the damages, less the freight. At the close of the trial defendants' counsel submitted certain propositions of fact and law, "each and every" of which he requested the referee to find as stated. The conclusions of law were: 1st. That plaintiff was "entitled to recover" the amounts claimed for freight; 2d. That defendants were "entitled to recover" a sum specified for their damages; 3d. That defendants were "entitled to judgment" for the balance. The referee found the first proposition, but refused to find the other two; to the refusal to find defendants' counsel excepted; but did not except to the finding. The General Term, on appeal, held, that the finding, in accordance with the request and the omission to except thereto, entitled plaintiff to maintain his judgment. *Held*, error; that the three propositions so submitted should have been taken together and construed as one sentence, and so taken, the request was that defendants have judgment upon the adjustment of the two claims, for the difference between them; and that, therefore, defendants were entitled to a review of the refusals to find and the referee's conclusions of law. *Id.*

4. In an action to recover for moneys alleged to have been loaned to the defendants, it appeared that defendants were executors of an estate, certain lots belonging to which were advertised for sale. Plaintiff's transactions were with defendant F., alone, and it did not appear that the other defendants gave any directions in regard to the loans, or ever promised to pay them. The referee found that the business relating to such sale was, with the assent of defendants, conducted by F., who disbursed large sums on account of the expenses of sale; that plaintiff advanced to him for the purpose of defraying expenses the sums mentioned in the complaint, and as matter of law, said referee found that said advances were for the benefit and at the request of all the defendants, and that they were liable. *Held*, that the conclusions of law were not authorized by the findings of fact; that from the facts that F. conducted the business, and that plaintiff advanced moneys to defray expenses, it did not follow as a necessary or logical result that defendants reaped any benefit therefrom, or requested plaintiff to make the advances. *Bryan* v. *Stewart.* 270

5. The refusal of a trial court, to whom a case is submitted for determination, to find, upon a question of law involved, as requested by the defeated party, is not error requiring a reversal of the judgment here, although the request might well have been granted, if this court arrives at the same final conclusion as to the right of recovery. *Loeb* v. *Hellman.* 601

FORECLOSURE.

1. In an action to foreclose a mortgage upon a leasehold interest, plaintiff was, upon his own motion and by consent, appointed receiver of the rents and profits of the mortgaged premises, with power to keep the buildings insured and in repair, and "to pay the ground-rent and taxes." Subsequently M., the holder of prior

mortgages, foreclosed, and upon sale the premises were bought in by M. for a sum less than his mortgages. Plaintiff, out of the rents collected by him as receiver, paid the ground rent from the time of his appointment to the time of sale; also for some repairs, and to M. a sum for interest on his mortgages. Upon settlement of his accounts as receiver plaintiff was required to pay over the balance in his hands in payment of taxes. *Held* error; that the appointment of plaintiff as receiver was for his benefit; not for the benefit of M., who might have applied for a receivership in his own suit, which would have superseded the rights of the plaintiff; that the terms of the order appointing plaintiff, as to the rents and taxes, were permissive, not mandatory; and plaintiff having, by diligence, acquired a specific lien upon the rents superior to the equities of M., was entitled to retain them to apply on his mortgage. *Ranney* v. *Peyser*. 1

2. Where in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defense of payment is interposed, the non-production of the bond by the plaintiff is evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover. *Bergen* v. *Urbahn*. 49

3. In an action for partition, plaintiff claimed title under a sale on foreclosure of two mortgages, both executed April 1, 1872. Two other mortgages were executed at the same time, all the mortgagees mutually agreeing that neither mortgage should have priority over either of the others, but that all should be equal liens. The mortgages under which plaintiff claimed were recorded in December, 1872; they were both assigned, the assignees taking for a valuable consideration and in good faith, and the assignments were recorded, one in January, 1874, the other in June, 1876. The other two mortgages were recorded, one in July, the other in August, 1877. *Held*, that the assignees of plaintiff's mortgages were subsequent purchasers under the Recording Act, and upon recording their assignments acquired a preference over the other mortgages, and that, therefore, plaintiffs acquired a valid title under the foreclosure sale. *Decker* v. *Boice*. 215

—— *When agreement as to purchase on foreclosure sale not illegal as calculated to prevent competition.*
See Marie v. *Garrison*. 14

FORGERY.

—— *When railroad corporation not bound by its bonds stolen from it and a certificate forged thereon in apparent compliance with condition therein.*
See Maas v. *M. K. & T. R. R. Co.* 223

FRAUD.

1. The fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as one *ex delicto*. *Sparman* v. *Keim*. 245

2. A vendee, entitled to rescind a sale for fraud, must act promptly on discovery of the fraud, and restore or offer to restore the property. By dealing with it as owner after such discovery he deprives himself of this remedy. *Schiffer* v. *Deitz*. 300

3. Where fraud upon the part of the vendor is claimed on the sale of real estate, a continuance in possession by the vendee after discovery of the fraud is evidence of an intent to abide by the contract. *Id.*

4. Defendant, in execution of a contract to convey certain premises to plaintiff by deed, with warranty free and clear from all incumbrances, executed a conveyance May 10, 1872. At the time of the execution of the contract and of the delivery of the deed, defendant was

married but his marriage was kept secret; defendant then supposed it to be invalid. Plaintiff had no knowledge of it until the fall of 1873, and defendant knew that plaintiff believed him to be unmarried. In an action to rescind the sale and conveyance, *held*, that defendant's belief in the invalidity of the marriage did not justify his omission to disclose the fact to plaintiff, as if void, or if it could be annulled, the fact of the formal marriage would be a cloud on title; that, therefore, a finding of fraud was justified, and on the discovery thereof plaintiff was entitled to demand a rescission. *Id.*

GAS-LIGHT COMPANIES.

1. The liability of a stockholder of a corporation organized under the act authorizing the incorporation of gas-light companies (chap. 37, Laws of 1848) to the creditors of the company imposed by said act § 10) until the whole capital stock has been paid in and certificate thereof filed, is not limited to the original incorporators, but applies as well to those becoming stockholders after the incorporation. *Briggs* v. *Waldron.* 582

2. *It seems*, that the complaint in an action brought by a creditor against a stockholder, under that act, is defective when it omits to state that the capital stock had not been paid in and certificate filed at the time the debt was incurred. *Id.*

3. *It seems*, also, that the certificate of a clerk of the proper county as to the non-filing of the certificate is defective where it omits to state that diligent search for it has been made in his office, as required by section 921 of the Code of Civil Procedure. *Id.*

GUARDIAN AD LITEM.

1. Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant. (§ 116, sub. 2.) *Gotendorf* v *Goldschmidt.* 110

2. Upon the petition of the plaintiff in a partition suit an order was made, as prescribed by said provision, appointing D. as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited, no steps having been taken by or on behalf of the infants, D. was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered. *Held*, that this was sufficient, both under said provision of the Code and under the provisions of the Revised Statutes in reference to proceedings in partition (2 R. S. 317, § 3), which are made applicable to actions for partition under said Code (§ 448); and, it appearing that the court had jurisdiction of the subject-matter, that a sale in pursuance of a judgment in the action gave a valid title as against said infant defendants. *Id.*

HUSBAND AND WIFE.

1. Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury survive to his personal representatives as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife, and the comforts of that society dies with him. *Cregin* v. *Brooklyn Cross-town R. R. Co.* 595

2. Upon revival of the action, therefore, only the damages that so survive are recoverable. *Id.*

—— *When wife may maintain ejectment against husband, and measure of damages therein. Wood* v. *Wood.* 575

See MARRIED WOMEN.

INDEMNITY.

1. Defendants obtained judgment against W. and issued execution thereon to plaintiff as marshal, who levied upon personal property to about double the amount of the execution. This property was claimed by D. & H. Defendants gave a bond of indemnity, a printed form being used; it contained a written recital of the levy and the claim of D. & H., and a printed condition to save plaintiff harmless from levying and selling under his execution "any personal property which he or they shall or may judge to belong to the judgment debtor." A portion of the property levied on which was not in fact the property of W. was taken from plaintiff's possession by some person unknown; upon his reporting the eloignment to the defendants they notified him that they should hold him responsible for the levy. Plaintiff thereafter, without the authority, knowlege or consent of defendants, levied upon and sold other property, the proceeds of which he paid to defendants who received it without any knowledge of such new levy. An action was brought by S. against plaintiff for such levy and sale and judgment recovered against him. In an action upon the bond, *held*, that it was intended simply to furnish indemnity for the levies already made; that its terms did not enlarge plaintiff's authority, and the subsequent unlawful levy and sale was made entirely at his risk, and that defendants were not liable. *Clark* v. *Woodruff.* 518

2. Also *held*, that the receipt by the defendants of the proceeds of the sale in ignorance of the facts was not a ratification; and that they were not affected by knowledge upon the part of their attorney, as he had no authority to bind them by directing a trespass or by ratifying one when committed. *Id.*

INDICTMENT.

1. An indictment for larceny averred that the stolen property was owned by "a body corporate," the name of which was given, "organized and existing under the laws of the State of New York." On the trial the people proved the due organization and existence of the corporation named under the laws of the United States. *Held*, that the averment of incorporation under the laws of the State of New York was surplusage that need not be proved; that all that was necessary to be averred and proved was that the owner was a corporation, having the name given to it in the indictment. *McCarney* v. *People.* 408

2. The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment. *Hope* v. *People.* 418

3. It is not a proper plea, therefore, to an indictment that the grand jury received incompetent and irrelevant evidence, to wit: the *ex parte* affidavits taken before the committing magistrate. *Id.*

4. *It seems* that allegations that a grand jury received and considered such affidavits would not be sufficient to sustain a motion to quash the indictment, in the absence of averments or proof that the affidavits were the only evidence or that some fact material to the case of the prosecution was established thereby, or that the witnesses by whom the affidavits were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence. *Id.*

5. Where an indictment contains

several counts, some of which are good, the fact that some of the counts are bad does not make a conviction erroneous where the verdict is general. *Id*

6. In an indictment under the statute for obtaining a signature to a written instrument under false pretenses, it is not essential to set forth all the details of the fraud, it is sufficient to specify particularly the pretenses, to aver their falsity and the fraudulent intent, and to show how they were effectual in accomplishing the fraud. *People ex rel. Phelps* v. *Oyer and Terminer*. 436

7. If the false pretense averred and proved is capable of defrauding it is sufficient, and this must be determined by the circumstances of each particular case. *Id.*

8. Such an indictment may be based upon a false claim of indebtedness against a municipal corporation; and if it appear that the claim was presented under circumstances and in such manner as was calculated to deceive the municipal officer whose duty it was to act thereon, and that his signature was thus procured, a conviction will be sustained. *Id.*

9. The question in such case whether the false pretense was calculated to deceive and was capable of defrauding is one for the jury. *Id.*

10. In an indictment, therefore, charging the accused with obtaining the signature of the mayor of the city of New York to a warrant drawn on its chamberlain by false pretenses, to wit: by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account, and that the city was justly indebted to the person in whose name the account was presented against the city. *Held*, that it was not necessary to set forth how the fraudulent account operated to deceive through the action of the intermediate agents of the corporation; that the manner in which the false representation reached the mayor was matter of detail belonging properly to the evidence on trial. *Id.*

11. An indictment under the statute providing for the punishment of any person who "shall administer to any *pregnant woman*" any medicine, etc., to cause a miscarriage, is sufficient, where instead of using the words "pregnant woman" it charges the offense to have been committed upon "a woman with child." *Eckhardt* v. *People*. 462

12. It is not essential in an indictment for a statutory offense to employ the precise words of the statute, it is sufficient to state all the facts constituting the offense, so as to bring the accused precisely within the statutory provisions. *Id.*

—— *Sufficiency of indictment under act to punish wrongs to children* (*chap.* 122, *Laws of* 1876).

See Cowley v. *People*. 464

INFANTS.

1. Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant. (§ 116, sub. 2.) *Gottendorf* v. *Goldschmidt*. 110

2. Upon the petition of the plaintiff in a partition suit, an order was made, as prescribed by said provision, appointing D. as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited,

no steps having been taken by or on behalf of the infants, D. was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered. *Held*, that this was sufficient, both under said provision of the Code and under the provisions of the Revised Statutes in reference to proceedings in partition (2 R. S. 317, § 3), which are made applicable to actions for partition under the Code (§ 448); and, it appearing that the court had jurisdiction of the subject-matter, that a sale in pursuance of a judgment in the action gave a valid title as against said infant defendants. *Id.*

3. Plaintiff in error was indicted under the provision of the act "to prevent and punish wrongs to children" (§ 4, chap. 122, Laws of 1876), which declares it to be a misdemeanor for one "having the care or custody of any child" to cause or permit the child's life to be endangered or health to be injured, etc. The charge was that the accused willfully neglected to provide the child named, of whom he had the care and custody, with proper and sufficient food, clothing and medicine, thus causing his health to be injured. It appeared, on trial, that the accused was the secretary of a benevolent institution, having a board of trustees, and subject to visitation of the Supreme Court and the State Board of Charities and Corrections. He was, however, in actual charge, provided for the household, and was the director of all its internal affairs, and had the actual care and custody of its inmates. *Held*, that he had the care and custody of the child within the meaning of the statute. *Cooley* v. *People*. 464

4. The court declined to charge that the prisoner had no right to receive and distribute the revenue provided by the legislature for said institution. It did not appear that the ability to supply more and different food or other needful things depended upon that revenue, but it appeared that he had other means in his power to use. *Held*, no error. *Id.*

5. The court charged that if the prisoner took the child into his care and custody, the law imposed upon him the duty of giving him food, clothing, care and medical attendance reasonably necessary and proper to keep his life from danger and his health from injury. Also, that if he did not have the means to provide what was needful for the child, it was his duty to apply to the public authorities for aid; and that if the prisoner neglected so to do, and life was endangered or health injured, he was guilty. *Held*, no error. *Id.*

6. One who, with no natural or legal duty, voluntarily seeks and assumes the care and custody of a child, is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody. *Id.*

7. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age. *Byrne* v. *N. Y. C. & H. R. R. R. Co.* 620

INSURANCE.

1. A broker who effects insurance under no employment by the insurers, but for a commission paid by them, upon the premiums received, for such risks as he procures to be offered and they choose to accept, is not an agent in such a sense that they will be bound by notice to him after policies are issued. *Devens* v. *Mech. and Tr. Ins. Co.* 168

2. An insurance company is not deprived of the defense of breach of warranty because, when a claim is first presented, while denying its liability, it omits to disclose the ground of defense or states another ground than that upon which it

finally relies; there must be in addition evidence justifying a finding that, with full knowledge of the facts, there was an intention to abandon or not to insist upon such defense, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury. *Id.*

3. The policy provided that the acts of the insurer in saving and preserving the property insured should not be considered as affirming or denying any liability under it. Defendant, when informed of the fire, directed the captain of the boat to store the articles saved; *held*, that this was not a waiver of the breach. *Id.*

INSURANCE (FIRE).

1. In an application for a policy of fire insurance upon a building, under the heading of "survey," and following several questions as to the materials of which the building was constructed and its condition, was the question, "For what purpose used; state fully?" The answer was, "Dwelling." *Held*, that this was not a warranty that at the time of the application the building was in use as a dwelling; that the question simply called for what the building was designed or fitted for; and that the fact that the building at that time was unoccupied did not establish a breach of warranty. *Woodruff v. Imp. F. Ins. Co.* 133

2. Defendant's agent at the time the application was made was informed that the house was then unoccupied and vacant. *Held*, that a condition in the policy requiring notice of and a special agreement indorsed on the policy in case the building became vacant and unoccupied, was waived. *Id.*

3. Within a few days after the policy was issued the house was in fact occupied as a dwelling. Subsequently there was a change of tenants; it did not appear but that the new tenants went in as soon as the old went out. No loss then occurred. *Held*, that the change was not a breach of said condition. *Id.*

4. The building was destroyed by fire April 3, 1875. It was rented and occupied up to April 1st. The tenant had permission "to keep his things" there after that time, and as a witness for defendant he testified, "my occupancy ceased when my things were burned up;" he also testified that he occupied as tenant, the barn and carriage house, which were also insured by the policy, and continued so to do after the fire. Another witness, who went to the house to see about repairs the day before the fire, testified that he saw articles of furniture in one of the rooms, and others were locked. *Held*, that the evidence justified the submission of the question as to whether the house was "vacant and unoccupied," to the jury. *Id.*

5. As to whether a "vacancy" under the terms of such a policy must be a vacancy of the entire premises, or whether each building insured stands by itself under the condition, *quære*. *Id.*

6. In an action upon a policy of fire insurance, upon real and personal property, the defense was that, at the time of the insurance and of the loss, the property did not belong to plaintiff. Defendant's evidence was to the effect that H., who was then the owner, conveyed the property in form to M., a fictitious person, and then in the name of M. he conveyed it to plaintiff. The court charged the jury, in substance, that if they believed there was no such person as M., or that he never executed the conveyance, they must find for defendant. *Held*, error; that, as it was to be assumed the conveyances were executed by H. with the intention of vesting title in plaintiff to whom they were delivered, and who the proof tended to show took and held possession of the property, although the conveyance to M., there being no such person, was invalid, yet the conveyance in the name of

M. to plaintiff was valid as against H., and the plaintiff showed sufficient title to maintain her action. *David* v. *Williamsburgh City F. Ins. Co.* 265

INSURANCE (LIFE).

1. On October 1, 1868, defendant issued an endowment policy on the life of T. which contained a condition declaring it void in case the insured should "travel upon the seas," without the written consent of the company previously obtained. Upon the back of the policy was also a stipulation to the effect that if, after three or more annual premiums had been paid, the policy should cease "in consequence of the non-payment of premiums," the company would, upon its surrender, issue a new policy for the full value acquired under the old one. The annual premiums were paid up to, and including, the one due October 1, 1875. In September, 1875, T., without obtaining the consent of the company, and without its previous knowledge or subsequent assent, went to Spain. Plaintiffs, in August, 1877, offered to surrender the policy and demanded a paid-up policy for eight-tenths of the amount of its amount, which was refused. In an action to enforce specific performance of such stipulation, *held*, that the policy and all rights under it were forfeited by the violation of said condition; and that even if a court of equity would, in any case, relieve against such a forfeiture, it was not authorized to do so here as it was not incurred by accident, ignorance, mistake, or any overpowering necessity. *Douglas* v. *Knick. L. Ins. Co.* 492

2. Also, *held*, that the stipulation did not constitute a separate and independent contract, but was to be taken in connection with the provision in the body of the policy, all constituting but one contract. *Id.*

3. Also, *held*, that the premiums paid were forfeited, although it was not so expressly provided in the policy. *Id.*

4. In reference to certain other conditions, some of which were conditions subsequent, it was expressly stated in the policy that in case of their violation, the premiums should be forfeited. *Held*, that the absence of this express provision, in reference to the condition in question, did not justify an inference that such a forfeiture was not intended. *Id.*

5. So, also, *held*, that the fact that as to certain other conditions it was expressly stated that its violation would work a forfeiture, "without notice," did not raise a presumption that the forfeiture here would not follow without notice, it appearing that there was an apparent purpose for the insertion of the express stipulation. *Id.*

6. When the last premium was paid in October, 1875, defendant gave a receipt, using a printed blank in general use by the company, which stated, in substance, that the policy was thereby continued in force for one year, subject to a condition forfeiting it in case any obligation given for premiums should not be paid when due. *Held*, that this receipt did not have the effect to relieve from the forfeiture and continue the policy in force for the year, but only continued it so far as depended upon the payment of premiums. *Id.*

7. On the back of the policy was printed a statement that permits would be granted by the company "on reasonable terms" for persons insured "to make voyages to any foreign country." It was claimed by plaintiff that a forfeiture of the policy was not caused by a failure to obtain such a permit before the forbidden travel, but that the trial court should have ascertained what a reasonable charge would have been for the permit and have allowed it to defendant. *Held*, untenable; that the defendant could not only make a reasonable charge for a permit, but could impose other conditions; and the terms

were so far in its discretion that unless it unreasonably refused a permit the court could not interfere; and as no permit was asked for, and the company was thus deprived of the opportunity to fix terms, there was nothing for a court of equity to act upon. *Id.*

INSURANCE (MARINE).

1. Defendant issued a policy of insurance to plaintiff upon his canal boat, which policy contained a warranty that the boat would be securely moored in a safe place satisfactory to "defendant from December 10 to April 1st * * * with privilege to lighter in New York harbor during the winter." The boat was laid up during the period specified at a place outside of said harbor. No notice of the laying up was given save to S., an insurance broker, not in defendant's employ, who solicited applications for insurance by it, forwarded them when obtained, and, if accepted, policies were issued, sent to S., who delivered them to the applicants and received commissions thereon. While so laid up the boat was destroyed by fire. In an action upon the policy, *held*, that notice to S. was not notice to defendant; and that there was a breach of the warranty avoiding the policy; also, *held*, that the privilege to lighter did not dispense with the warranty, or justify the omission to give notice. *Devens* v. *Mech. & Traders' Ins. Co.* 168

2. Plaintiff served the proofs of loss upon the general manager of defendant and asked him if they were all right; he answered that they were, and, upon being asked what was due on the policy, answered, "we considered not any thing, and that it was the carelessness of the captain of the boat." *Held*, that this was not a waiver of the breach, nor did it estop defendant from claiming it. *Id.*

—— *Construction of policy and of policy of reinsurance. See St. N. Ins. Co.* v. *M. M. F. and M. Ins. Co.* (*Mem.*) 604

JOINT TENANTS.

See TENANTS IN COMMON AND JOINT TENANTS.

JUDGMENTS.

Where a court, authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. *Risley* v. *Phenix Bk. of N. Y.* 318

JUDICIAL NOTICE.

1 *It seems* that the court will take judicial notice of the nature of the business and the office of mercantile agencies. *Eaton C. & B. Co.* v. *Avery.* 31

2. The courts will take judicial notice of the general course of business in a community, including the universal practice of banks. *Merchants' Nat. Bk.* v. *Hall.* 338

JUDICIAL SALES.

1. A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (§ 184, sub. 4), and an advertisement of the premises for sale is a "seizure" within said provision. *Un. Dime Svgs. Instn.* v. *Anderson.* 174

2. Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, advertised premises for sale upon a day after his term had expired, *held*, that he had authority and was bound to proceed with and complete the sale. *Id.*

—— *When agreement as to pur-*

chase on foreclosure sale not illegal as calculated to prevent competition.
See Marie v. *Garrison.* 14

JURISDICTION.

Where a court, authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally. *Risley* v. *Phenix Bk.* 318

—— *Court of Appeals no jurisdiction to entertain motion to set aside a judgment below.*
See Veeder v. *Baker.* 163

—— *Under the act of* 1879 (*chap.* 390 *of Laws of* 1879), *Courts of Special Sessions have exclusive jurisdiction to try "charges for petit larceny not charged as a second offense," and the Supreme Court has no power to let to bail one charged with that offense. People ex rel.* v. *Dutcher.* 240

—— *Where order in supplementary proceedings made in district where venue was laid and roll filed appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides, such justice has power to change referees and the exercise of this power is discretionary and not reviewable here.*
See Pardee v. *Tilton* (*Mem.*) 623

JURY.

Upon a criminal trial a juror was challenged by the prisoner for principal cause and to favor; he testified in substance that he had read in the newspapers of great frauds perpetrated against the city; that he had read of the prisoner's case, and had formed, in some degree, an opinion in regard thereto, which he had yet, and it would require evidence to remove it; but that his opinion was contingent, founded on an assumption of the truth of what he had read, which he had not investigated; that his opinion was the general impression a man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict, and that his previously formed opinion would not bias or affect such verdict, nor would he be influenced at all on the trial thereby; that if put upon the jury he would discard his opinion and decide upon the testimony, and in that event it would not require evidence to overcome his opinion, and he would try the case without being influenced by it. The challenges were overruled and the juror was then challenged peremptorily. After the full number of peremptory challenges had been exhausted another juror was called whom the prisoner's counsel proposed to challenge peremptorily upon the ground that they had been unlawfully compelled to exhaust challenges by the alleged erroneous decision of the court as to the competency of said juror. The court denied the right to further peremptory challenges. *Held*, no error; that if the question could be thus raised, as to which *quære*, the ruling as to competency was correct, and the exhaustion of the peremptory challenges was not compelled by any error of the court. *People ex rel. Phelps* v. *Oyer and Terminer.* 436

LARCENY.

1. The provision of the State Constitution (art. 6, § 26), declaring that "courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law" is not limited to offenses of the grade specified, created by statute after the adoption of that provision; it includes as well all such offenses existing by statute at that time, including petit larceny. *People ex rel.* v. *Dutcher.* 240

2. The said provision also was intended to confer authority upon said courts as they were then or might thereafter be constituted by statute and without regard to the question whether or not they were authorized to summon and impanel a common-law jury. *Id.*

8. The provision, therefore, of the act of 1879 (chap. 390, Laws of 1879), giving to courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offense," is constitutional and valid. *Id.*

4. The Supreme Court has no power to let to bail one charged with such an offense. *Id.*

5. An indictment for larceny averred that the stolen property was owned by "a body corporate," the name of which was given, "organized and existing under the laws of the State of New York." On the trial the people proved the due organization and existence of the corporation named under the laws of the United States. *Held*, that the averment of incorporation under the laws of the State of New York was surplusage that need not be proved; that all that was necessary to be averred and proved was that the owner was a corporation, having the name given to it in the indictment. *McCarney* v. *People.* 408

6. It did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in planning the theft and in learning the situation of the premises and the ways of the keeper thereof. That the one who was in fact engaged in taking the property sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number, and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts. *Held*, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury. *Id.*

LEASE.

1. In May, 1872, in pursuance of a resolution of the board of supervisors of the county of New York directing it, a lease was executed by the mayor of the city and by plaintiff, by which the latter leased to the city certain rooms as chambers for the recorder, for one year; that officer occupied them until July, 1877, and delivered up the keys to plaintiff about May 1st, 1878. The rent was paid by the comptroller of the city at the rate named in the lease, up to November 1, 1876. In December, 1876, under a resolution of the board of aldermen, other rooms were set apart for the recorder, but because they were unfit for occupancy he did not take possession of them until June or July, 1877. In May, 1877, plaintiff was notified by the comptroller that the city would not be held liable after May 1st of that year. In an action brought to recover rent accruing after November 1st, 1876, *held*, that the recorder having been placed in possession under the lease by the board of supervisors, whose duty and power it was to procure him chambers, it was to be presumed that it acquiesced in his continuance in possession after the expiration of the lease; that the board, having the power originally to take the lease, had the power also, with the consent of the landlord, or without his dissent, to hold over after the term had expired; that by acquiescing in the action of the recorder the board exercised this power, and the lease was thus renewed from year to year, and that plaintiff was entitled to recover. *Davies* v. *Mayor, etc.* 207

2. Also *held*, that such a renting did not fall within the phrase "work or supplies" for which there must be, under the city charter of 1873 (§§ 92, 112, chap. 335, Laws of 1873), a letting by contract to the lowest bidder and certificate of necessity from the head of a department. *Id.*

3. Also *held*, conceding that upon the adoption of the resolution of

December, 1876, by the board, the continuance in occupation by the recorder was no longer permitted, plaintiff was at least entitled to the rent for the balance of the rental year, *i. e.*, to May 1, 1877. *Id.*

LIENS.

1. An assignee in good faith and for a valuable consideration of a recorded mortgage gets no preference over a prior unrecorded deed or mortgage by reason of such record, when his assignor could not claim it by reason of notice or any other equity. *Decker* v. *Boice.* 215

2. The contrary rule declared in *Jackson* v. *Van Valkenburgh* (8 Cow. 260), held to be no longer in force. *Id.*

3. Such assignee is, however, a purchaser, and his assignment is a conveyance under the Recording Act. (1 R. S. 756, §§ 37, 38.) *Id.*

4. If, therefore, the assignment is recorded before the recording of such prior deed or mortgage, he thereby obtains a preference; and an unrecorded conveyance is as to him void under said act. *Id.*

5. Where, in the complaint, and upon the trial of an action to recover possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and, in any event, before the lien can be restored, the false claim of title must be abandoned, the title of the true owner conceded and the claim reduced to one of lien. *Hudson* v. *Swan.* 552

—— *When lien of junior mortgagee upon rents and profits obtained by appointment of receiver in foreclosure suit is superior to equities for prior mortgagee.*
See Ranney v. *Peyser.* 1

—— *An attorney's lien on judgment for costs can only be asserted by him; until so asserted judgment belongs to plaintiff and may be attached.*
See Wehle v. *Conner.* 231

See MECHANICS' LIEN.

LIMITATION OF ACTIONS.

1. By the amendment of section 88 of the Code of Procedure in 1870 (§ 5, chap. 741, Laws of 1870), striking out married women from the list of persons against whom the statute of limitations does not run, a married woman, as to the time of commencing actions, was placed upon the same footing as other persons, and thereafter she was bound to commence her action within the time specified after the cause of action accrued, although it had accrued prior to the amendment. *Clarke* v. *Gibbons.* 107

2. Accordingly, *held,* in an action of ejectment brought by a married woman that an adverse possession of twenty years was a good defense. *Id.*

LOAN.

One of several executors has no authority to borrow money without the assent of the others, and such assent is not to be assumed from the fact that the loan was for the benefit of the estate. *Bryan* v. *Stewart.* 270

MANDAMUS.

—— *An action is not maintainable against a department of a city government; the remedy is by mandamus, not by action.*
See Swift v. *Mayor.* 528

MANDATE.

A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (§ 184, sub. 4), and an advertisement of the

premises for sale is a "seizure" within said provision. *Un. Dime Sogs. Instn.* v. *Anderson.* 174

MANUFACTURING CORPORATIONS.

1. As an action under the manufacturing act (§ 15, chap. 40, Laws of 1848), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (Code of Civil Procedure, § 983) and must be tried in the county where the cause of action or some part thereof arose. *Veeder* v. *Baker.* 156

2. As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. *Id.*

See MINING CORPORATIONS.

MARRIED WOMEN.

1. By the amendment of section 88 of the Code of Procedure in 1870 (§ 5, chap. 741, Laws of 1870), striking out married women from the list of persons, against whom the statute of limitations does not run, a married woman, as to the time of commencing actions, was placed upon the same footing as other persons, and thereafter she was bound to commence her action within the time specified after the cause of action accrued, although it had accrued prior to the amendment. *Clarke* v. *Gibbons.* 107

2. Accordingly, *held*, in an action of ejectment brought by a married woman, that an adverse possession of twenty years was a good defense. *Id.*

3. In 1844 certain premises were conveyed to plaintiff, a married woman, for life, as and for her own separate estate, free from the control of her husband, her husband covenanting for a consideration expressed that she should hold the premises to her own separate and sole use, free from any claim or interference from him. In an action to recover possession of the premises brought against the husband and his tenant, *held*, that under the law as it existed when the deed was executed, plaintiff could, in equity, enjoy the property separate from her husband; that a trustee was not required to be named in the instrument, as in case of such omission the law created the husband a trustee for the wife; that the effect of the acts in relation to married women (chap. 200, Laws of 1848; chap. 375, Laws of 1849; chap. 90, Laws of 1860; chap. 172, Laws of 1862) was to change her equitable right to hold a separate estate into a legal estate, to give her the right of control and management the same as if she were a *feme sole;* that there was no occasion for her to resort to the Supreme Court, under the act of 1849 (§ 2), for the resignation and surrender of the trustee and a conveyance to her; and that as, by the said acts, she was given the power to sue and be sued she could maintain the action. *Wood* v. *Wood.* 575

4. Also, *held*, that as it appeared that the husband had not acquired possession by the consent of the plaintiff, he was not entitled to notice to quit. *Id.*

5. Also, *held*, that the fact that the defendant had put valuable improvements upon the land was no defense to the action. *Id.*

6. *It seems* that one who has put improvements upon the lands of another is at the best only allowed to thereby mitigate the damages by offsetting them to the extent of the rents and profits claimed. To do this he must be a *bona fide* occupant; he cannot be allowed them if he has acted with knowledge of the owner's right. *Id.*

MASTER AND SERVANT.

An employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, but is not a guarantor of their safety; and in an action by an employee for alleged neglect to perform this duty, the *onus* is upon the plaintiff to show negligence. *Painton* v. *No. Cent. R. Co.* 7

MECHANICS' LIEN.

1. Under the provisions of the mechanic's lien law of 1862, for Kings and Queens counties (§ 1, chap. 478, Laws of 1862), which directs the disallowing as against lienors of any payment made by the owner "by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract," payments made in advance, although without fraud or collusion, cannot be allowed. *Post* v. *Campbell.* 279

2. The statute, however, was intended to protect the lienor against payments made to the contractor or other persons to the prejudice of the lienor, and where payments in advance were made to him on account of the work or materials for which he claims a lien, he will not be permitted to dispute the right of the owner to have them credited because they were made too soon. *Id.*

3. *It seems*, that under said act a lienor is only entitled to the value of materials and work performed within three months next preceding the filing of the notice of lien. *Id.*

4. In an action by a sub-contractor to enforce a lien under said act, plaintiffs claimed and were allowed, by the referee, $4,350, and interest. The referee found that the value of the work performed by plaintiffs within three months preceding the filing of notice was $1,077.17. The last installment on plaintiffs' contract was $3,350, payable ten days after the completion of the work. *Held*, that conceding the lien could be established as to the last installment by filing a notice within three months after the completion of the work, on the ground that it was not earned until such completion, this did not justify the including in the judgment work done previous to the three months and not embraced in that installment. *Id.*

MERCANTILE AGENCY.

1. Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procurecred its and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor, against the partner making such false representations. *Eaton C. & B. Co.* v. *Avery.* 31

2. *It seems* that the court will take judicial notice of the nature of the business and the office of mercantile agencies. *Id.*

3. A person furnishing information to such an agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him. *Id.*

MINING CORPORATIONS.

1. In an action against the trustees of a corporation to charge them with a debt of the corporation because of an omission to make and file its annual report, it appeared that it was organized for the purpose of mining coal and bringing it to New York for its stockholders and for sale, and this was stated

in its certificate of incorporation. The treasurer of the corporation wrote to plaintiffs under the heading of the corporate name, stating that they desired plaintiffs to furnish them with coal delivered to any part of the city, as directed, plaintiffs collecting the bills in the name of the company and being paid the difference due each month; also to deliver the company's coal and to act as its delivery agents. Plaintiffs answered assenting to the arrangement. Under it, upon orders issued by the secretary and the treasurer, who were not directors of the company, plaintiffs delivered coal to divers persons, and the alleged indebtedness of the company was for a balance due upon the coal so delivered. It did not appear that the coal was delivered to stockholders or upon any contracts made by the company, or that the transactions were known to any of its directors or appeared upon any of its books. It did appear that they were not authorized by resolution of the board of directors and that they were unknown to a majority of them, and there was no competent evidence that the corporation received the proceeds of the coal. *Held*, that plaintiffs failed to establish a debt against the corporation and therefore that the action was not maintainable. *Alexander* v. *Cauldwell*. 480

2. Also, *held*, that admissions of the treasurer, that he had received payment for the coal and had used it in the business of the company was incompetent; that he being unauthorized to buy the coal could not bind the company by subsequent admissions that he had received and disbursed the proceeds for its benefit. *Id*.

MISDEMEANOR.

——*Sufficiency of evidence to convict, under statute to punish wrongs to children.*
See Cowley v. *People*. 464

MONEY HAD AND RECEIVED.

1. An action for moneys had and received is maintainable against a town to recover moneys of another wrongfully taken by it and applied to its own use. *Horn* v. *Town of New Lots*. 100

2. Where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. *Haynes* v. *Rudd*. 251

3. As to whether one who aids in doing a criminal act can, under any circumstances, have an action to recover any thing paid by him in furtherance thereof, *quære*. *Id*.

MORTGAGE.

1. A mortgage was executed to M. and S., who were copartners, doing business under the firm name of M. & Co. It was expressed in the condition of the mortgage that it was intended among other things, "as a continuing security and indemnity" to the mortgagees "for and against all liabilities they then had incurred or might thereafter incur as indorsers, acceptors or sureties in any form," for J. B., one of the mortgagors, or the firm of J. B. & Co. *Held*, that the mortgage included not merely such liabilities as were incurred by the mortgagees jointly as copartners; but such as were incurred by either of them, separately and individually. *Nat. Bk.* v. *Bigler*. 51

2. After the delivery of the mortgage M. died; by the articles of copartnership it was stipulated that in case of the death of one of the partners, the survivor should continue to carry on the business for the benefit of both parties, for a time specified after such death. *Held*, that the authority thus conferred, if valid and operative (as to which *quære*), did not authorize the survivor to bind the estate of

the deceased by new accommodation indorsements, nor did it permit and make valid an indorsement of the firm executed by the survivor as a renewal of an indorsement made in the life-time of the deceased, and with his assent. *Id.*

3. At the time of the death of M. plaintiff held the paper of J. B. & Co., indorsed by M. & Co. to a large amount. Upon the request of B. & Co. and with the concurrence of S. and the assent of the executors of M., an arrangement was made to the effect that the mortgage should be assigned to plaintiff, that the paper held by the latter should be protested at maturity, and as each note matured, J. B. & Co. should make a new note for the same amount, to be indorsed by S. and discounted by plaintiff, the proceeds to be credited to S., and therewith he was then to take up the old note and pledge it to plaintiff as security for the new one; it being the intention of the parties, as the court found, that the paper so held at the death of M. was not to be paid or extinguished, but kept alive against all the parties. This arrangement was carried out. *Held*, that it did not operate as a payment of the notes secured by the mortgage; that no presumption of payment arose from the taking of the renewal notes; also that the assignment transferred to plaintiff the right to enforce the mortgage security. *Id.*

4. *It seems*, that plaintiff, had there been no agreement, would have been equitably entitled to an assignment of the mortgage. *Id.*

5. Also, *held*, that the mortgage was not one of indemnity merely, but was a security as well, against all liabilities, and that, therefore, it was not essential to a recovery to show that damages had been sustained; that the right of the mortgagees to resort to the security arose when their liability, as indorsers, was fixed. *Id.*

6. The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out. *Id.*

7. Some drafts drawn by J. B. & Co. and indorsed by M. & Co., before the death of M., were taken up with the proceeds of new drafts, indorsed by S., and discounted by plaintiff, who received the old drafts in pledge under the agreement. *Held*, that the transactions were renewals, not payments, and that at least the liability of S. on the new paper was sufficient to make the mortgage available to the plaintiff as security therefor. *Id.*

8. Defendant M. A. B. who owned an undivided interest in the mortgaged premises joined in the mortgage as security for J. B. & Co.; it was claimed on her behalf that the arrangement with the plaintiff for renewals operated as an extension of the time of payment; that after the death of M. no effectual consent to an extension, binding the firm of M. & Co., could be given, and that thereby the liability of M. & Co. was released. *Held*, untenable, as no valid agreement extending the time of payment of the original notes was shown. *Id.*

9. Plaintiff sold to defendant W. certain premises, taking a mortgage thereon to secure a portion of the purchase-money; subsequently W. conveyed to defendants K. and H. undivided interests in said premises, the deed reciting that the parties thereto were jointly interested in the purchase from plaintiff, the title having, for convenience, been taken in the name of W. for the use and benefit of all in certain specified proportions, and that the grantees had assumed and agreed to pay their proportions of said mortgage. The conveyance was made subject to the mortgage, and the proportions thereof specified the grantees assumed and agreed to pay as part of the consideration. In an action to recover a deficiency arising on foreclosure of the mortgage, *held*, that there was a suffi-

possession until November 18th, when they demanded repayment of their loan. Meanwhile, N. had shipped the corn to New York by canal, and on the faith of the canal boat bills of lading obtained advances from defendants, who received the corn on arrival. *Held*, that conceding plaintiffs' claim could not be enforced as against defendants, as to which *quære*, yet it remained good as against N. or hiscreditors, and defendants would be entitled to protection against such claim only to the extent of their advances, and so far only as a lien on the corn or its proceeds was necessary to secure such advances; and, it appearing that defendants had in their hands other funds, belonging to N. upon which they had a lien for, and had the right to apply to the payment of, these advances, and which after notice of plaintiffs' claim they paid over to another on the order of N. *Held*, that plaintiffs were entitled to demand, and upon refusal to pay, to maintain an action to recover the corn or its proceeds. *Hazard* v. *Fiske*. 287

2. Also, *held*, that plaintiffs' right to have such other funds applied to cancel defendants' lien was superior to the title thereto of an assignee in bankruptcy of N., or to that of any person to whom N. might have assigned the same. *Id.*

3. Defendant, S. E. H., assigned to plaintiff a certificate of stock in a manufacturing corporation "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. W. H. S. E. H. was the wife of E. W. H., who, at the time the assignment was executed, was largely indebted to the plaintiff and was on the verge of actual insolvency. In an action to foreclose plaintiff's lien upon the stock pledged, *held*, that the assignment, by its terms, included and secured all demands had and held by plaintiff against E., after its execution, as well as those existing at that time; and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security, and that an extension of time, by renewals in the ordinary course of business, granted by plaintiff to E. W. H. for payment of any of the debts, did not discharge the lien upon the stock. *Mer. Nat. Bk.* v. *Hall*. 338

4. *It seems* that S. E. H. could at any time, by giving notice, have restricted the security to demands actually held by plaintiff at the time of notice, and thus have terminated her responsibility. *Id.*

5. Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. *Duncan* v. *Brennan*. 487

6. Nor can it be so held although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general accountcannot be invoked. *Id.*

7. Plaintiffs, who were bankers, loaned to B. Bros. & H. $10,000, upon the specific pledge of a quantity of whisky; this loan was paid in full. Prior and subsequent to this loan plaintiffs made other advances to said firm to a large amount. The whisky was levied on by B., defendant's testator, then sheriff, under attachments, against M. On the trial of an action to recover possession of the whisky, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whisky was the property of M.; this evidence was excluded. *Held*, error; that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them. *Id.*

8. Also, *held*, that as plaintiff had no right of possession at the time of the levy, a denial of a motion to dismiss the complaint was error. *Id.*

PRACTICE.

It seems, that the proper practice

where the venue in a local action is laid in the wrong county is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change is authorized by the Code (§ 987) he must make his motion. *Veeder* v. *Baker*. 156

—— *Where upon pendency of appeal to this court from order denying motion to change venue, plaintiff moves cause for trial and takes judgment, a motion to set aside the judgment should be made in the Supreme Court; this court has no jurisdiction of it.*
See Veeder v. *Baker*. 163

See PLEADING.
CRIMINAL TRIAL.
TRIAL.

PRESUMPTION.

A person furnishing information to a mercantile agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him. *Eaton C. & B. Co.* v. *Avery*. 3

—— *Where presumption of payment does not arise from the taking of renewal notes.*
See Nat. Bk. v. *Bigler*. 51

PRINCIPAL AND AGENT.

1. One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority. *Alexander* v. *Cauldwell*. 480

2. It cannot be presumed that the agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in. *Id.*

3. As a general rule, and in the absence of an express agreement imposing a different liability, an agent engages simply for ordinary care and skill in the discharge of the duties of his agency, and is only liable to his principal for injuries resulting from a want thereof. *Loeb* v. *Hellman*. 601

4. The liabilities, however, of the agent may be enlarged by express contract, and he may undertake to insure his principal. *Id.*

—— *Authority of stock broker to sell and liability of, for negligence.*
See Harris v. *Tumbridge*. 92

—— *Insurance broker not agent for company in such sense as to bind it by notice to him.*
See Devens v. *M. & T. Ins. Co.* 168

See BROKER.

PRINCIPAL AND SURETY.

1. Where, in an agreement for an extension of the time of payment made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby. *Nat. Bk.* v. *Bigler*. 51

2. *It seems* that one of several original debtors may so contract with the others for their assumption and payment of the common debt, as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor. *Palmer* v. *Purdy*. 144

3. Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety. *Id.*

4. Plaintiff leased certain premises to a firm. Two of the partners subsequently left the firm and the premises, the partners remaining having by valid contract assumed and agreed to pay the rent thereafter accruing. In an action brought against the original members of the firm to recover such rent, it appeared that plaintiff was

informed that the two partners were going out, and that the others were to remain and would pay the rent; but it did not appear that he was advised of any agreement by which those remaining were bound to pay the rent, or by which the legal relation of the retiring members of the firm to the common liability was changed. *Held*, that the evidence failed to establish the right of the retiring partners to be treated as sureties. *Id.*

5. S. & O., the defendants who continued the business, gave their notes to plaintiff for rent in arrears. These were accepted by him upon the express stipulation that the liability of G. & P., the other defendants, should not thereby be released, and with the reservation of his rights and remedies against them. *Held*, that the arrangement was not such an extension as discharged G. & P., even if the rights of sureties were accorded to them. *Id.*

6. Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (§ 338), containing among other things this provision, that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General Term in September, 1865, and in October, 1865. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the General Term *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court. *Church* v. *Simmons*. 261

7. *It seems* that if after judgment of affirmance the defendant continued in possession by permission of the plaintiff under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant. *Id.*

8. *It seems* also that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts. *Id.*

9. *It seems* also that the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking on the second appeal. *Id.*

QUESTIONS OF LAW AND FACT.

1. In an action upon a policy of fire insurance, it appeared that the building was destroyed by fire April 3, 1875. It was rented and occupied up to April 1st. The tenant had permission "to keep his things" there after that time, and as a witness for defendant he testified, "my occupancy ceased when my things were burned up;" he also testified that he occupied as tenant the barn and carriage house, which were also insured by the policy, and continued so to do after the fire. Another witness, who went to the house to see about repairs the day before the fire, testified that he saw articles of furniture in one of the rooms, and others were locked. *Held*, that the evidence justified the submission of the question as to whether the house was "vacant and unoccupied," to the jury. *Woodruff* v. *Imp. F. Ins. Co.* 133

2. In an action to recover damages for alleged negligence, plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. *Payne* v. *Troy & B. R. R. Co.* 572

—— *In action against stockbroker when question for jury.*
See Harris v. *Tumbridge.* 92

—— *Where negligence a question of fact.*
See Wooley v. *G. S. & N. R. R. Co.* 121

—— *When question of contributory negligence is one of fact.*
See Byrne v. *N. Y. C. & H. R. R. R. Co.* (*Mem.*) 620

RAILROAD CORPORATIONS.

1. Plaintiff, a brakeman in defendant's employ, was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. In an action to recover damages it appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant, or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to. *Painton* v. *No. Cent. R. R Co.* 7

2. There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury. *Id.*

3. Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable; that defendant had put salt on its track which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. In an action to recover damages, *held*, that the evidence justified the submission of the question of defendant's negligence to a jury. *Wooley* v. *Grand St., etc., R. R. Co.* 121

4. Plaintiff knew that there was a switch in that locality, but it did not appear that he had in mind its precise location; he was not thinking particularly of the switch at the moment of the accident; but, thinking the place was one dangerous to cross without care, was going slowly and using great caution. *Held*, that he was not, as matter of law, chargeable with contributory negligence; but that the question was one for the jury. *Id.*

5. The evidence was to the effect that, as between the defendant and the other street railway, with whose tracks the switch made a connection, the defendant was to keep the switch and the abutting pavement in good condition. The court was asked to charge that if the switch was properly put down defendant was not chargeable; the request was refused, but the court charged that if the switch was skillfully put down and was in itself no obstruction, which a person could not, with ordinary care and prudence, avoid, the proposition would be correct. *Held*, no error; that although the switch was a proper one and well laid down, if it subsequently, from any cause, was raised to an undue height above the pavement, or the pavement had sunk unduly below it, it was defendant's duty to put it in good condition. *Id.*

(§§ 92, 112, chap. 335, Laws of 1873), a letting by contract to the lowest bidder and certificate of necessity from the head of a department. *Id.*

4. Also, *held*, conceding that upon the adoption of the resolution of December, 1876, by the board the continuance in occupation by the recorder was no longer permitted, plaintiff was at least entitled to the rent for the balance of the rental year, *i. e.*, to May 1, 1877. *Id.*

5. In pursuance of an invalid ordinance of the common council, the Croton Aqueduct board of the city of New York advertised for proposals for paving a street. On October 15, 1869, the proposals for the work were opened, plaintiff was announced to be the lowest bidder, and the contract was awarded to him. Plaintiff's proposal was accompanied by a bond with sureties as required by the specifications. On December 18, 1869, the common council, by resolution, rescinded the ordinance. Plaintiff thereafter demanded, of the said board, that the contract should be executed, which was refused. In May, 1872, plaintiff presented the papers to the commissioners appointed under the act of 1872 (chap. 580, Laws of 1872), who gave a certificate that there was no fraud in the award. In an action to recover damages, *held*, that the award of the contract by the board was an approval of a sufficiency of the sureties and no other was needed; that the security mentioned in section 38 of the city charter of 1857 (chap. 446, Laws of 1857), which is required to be approved by the comptroller, was that required of the contractor on entering into the formal contract after the award to him, but, *held*, that the ordinance not having been legally passed all subsequent proceedings were invalid and plaintiff acquired no rights under it; that, as previous to the passage of the act of 1872, the ordinance was annulled, there was nothing for the commissioners to act upon, and that, therefore, plaintiff was not entitled to recover. *Baird* v. *Mayor, etc.* 254

6. Also, *held*, that the resolution rescinding the ordinance was not required to be published, as it did not involve any of the matters mentioned in the provision of said charter (§ 38) in reference to publication. *Id.*

7. *It seems* that had the ordinance, authorizing the work, been valid and the proceedings, prior to opening the bids, regular, plaintiff would have had a valid contract for the breach of which he could have claimed damages (chap. 308, Laws of 1861); and that, having such a contract, it could not be destroyed by the rescission of the ordinance. *Id.*

8. Also, that the quantities mentioned in the specifications were proper to be taken as *prima facie* the amount of work to be done; and that the prices specified in the proposal, less what the work could have been done for, furnished the proper measure of damages. *Id.*

9. Plaintiff was appointed an attendant of the Supreme Court by the board of supervisors of the county of New York, under the provision of the Code of Procedure (§ 28), requiring the "supervisors of the several counties" to provide the courts appointed to be held therein, with * * * attendants, * * * suitable and sufficient for the transaction of their business. *Held*, that he was "in office" within the meaning of the provision of the act of 1870 (§ 3, chap. 382, Laws of 1870), in reference to said county, which prohibits the board of supervisors of said county from "increasing the salaries of those now in office, or their successors; and that, therefore, an ordinance of said board increasing plaintiff's salary was illegal and void. *Rowland* v. *Mayor, etc.* 372

10. The intention of said act was to extend the prohibition to all persons who, under any name, were the recipients of salaries from the city treasury. *Id.*

11. The published notice inviting bids for a local improvement in the city of New York contained a provision that the bidders should state in their proposals the price per cubic yard for rock excavations, and one-fourth the price bid would be allowed as the price for earth excavations; the notice contained the estimated quantities of work to be done. *Held*, that in the absence of allegations or proof that the provision was fraudulently inserted or that it in fact did any harm, this was not a violation of the provisions of the charter of 1870 (§ 104, chap. 137, Laws of 1870), requiring contracts for such work to be let to the lowest bidder. *In re Marsh.* 431

12. A bid a little lower than the one accepted, tested by the estimated quantities, was rejected because of failure to conform to this specification, the bid for earth excavation being slightly in excess of one-fourth of that paid for rock excavation. *Held*, that the commissioner of public works having authority to insert the specification could require a literal and exact compliance therewith, and could reject as informal all bids not so complying, and a letting to the lowest bidder who did so comply was valid. *Id.*

13. It appeared that the bid accepted, tested by the actual quantities as found in the prosecution of the work and as paid for, was the lowest. *Held*, that the error, if any, in not awarding the contract to the apparent lowest bidder was not a substantial one within the meaning of the statute of 1874, relating to the vacating of assessments (chaps. 312, 313, Laws of 1874); and that one whose lands were assessed for the improvement was not aggrieved thereby; and, therefore, was not entitled to have the assessment vacated. *Id.*

14. *It seems* that under the charter of the city of New York, of 1873 (chap. 335 of the Laws of 1873), although the power of incurring obligations for street cleaning is conferred upon the police department, yet as that department exercises the power simply as one of the executive branches and instrumentalities of the city government and on its behalf, the duty of providing means for their payment and of paying them resting upon the corporation, it could be treated as the debtor; and an action would be maintainable against it. *Swift* v. *Mayor, etc.* 528

15. The police department, however, having been by the act supplementary to the charter (chap. 755 of the Laws of 1873) intrusted with the payment of its own expenditures through its own treasurer, an action would not lie in the first instance against the corporation for an indebtedness incurred by the street department. *Id.*

16. The remedy of the creditor against the police department is by mandamus, not by action. *Id.*

17. Plaintiff was employed by the police department in March, 1874, to remove the garbage from the streets at an agreed compensation of $800 per month; the employment terminable at the pleasure of the department and it was so terminated in July, 1874. Plaintiff's bills were paid for two months. For the residue of the time they were rendered, but not paid. From March, 1874, to January 17, 1877, there was upon the books of the street cleaning bureau of the police department an unexpended balance of appropriations for the year 1874, more than sufficient to pay plaintiff's claim; this was paid into the city treasury on the day last named. Plaintiff duly presented his claim to the comptroller and demanded payment, which demand was not complied with. In an action to recover the balance unpaid, *held*, that the action was not maintainable against the police department; but that as it appeared that at the time plaintiff's claim accrued there were in the street cleaning department moneys sufficient and legally appropriated to the payment thereof, and as after notice thereof the depart-

ment paid this fund into the city treasury, where, so far as appeared, it still remained, it constituted a specific fund upon which the law impressed a trust for the payment of his claim which the plaintiff was entitled to have so applied; and that as the corporation took the fund with notice of the trust and of plaintiff's claim, an action was maintainable against it to compel the execution of the trust. *Id.*

18. Also *held*, that the contract for the work was not within the provision of said charter (§ 91), providing that where work is necessary to be done to complete or perfect a particular job for the corporation, involving an expenditure of over $1,000, the same shall be let by contract, after advertisement, to the lowest bidder; as the work here was not done to complete any particular job, and it did not necessarily involve an expenditure of more than $1,000. *Id.*

19. The power conferred upon the commissioners of Central park by the act of 1867 (§ 1, chap. 697, Laws of 1867) to change the grade of any of the streets within a district therein specified, in the city of New York, was not subject to, or limited by, the provision of the act of 1852 (§ 2, chap. 52, Laws of 1852), prohibiting the common council of said city from changing the grade of streets without the written consent of the owners of two-thirds, in lineal feet, of the adjoining lands. *In re Walter.* 538

20. Accordingly, *held*, that an assessment for a change in the grade of a street, made by said commissioners under said act of 1867, was not invalidated because of failure to obtain such consent. *Id.*

21. Prior to the passage of the New York city charter of 1873 (chap. 335, Laws of 1873) under the provisions of the act of 1871 (§ 1, chap. 226, Laws of 1871), changing the grade of a portion of Ninth avenue, and directing the commissioner of public works to proceed forthwith in such manner as should be deemed necessary and proper to regulate and grade said avenue, according to the grade so fixed, certain maps were filed; one of the streets intersecting Ninth avenue, the grade of which by said act of 1871 (§§ 2–4), the said commissioner was authorized to change so as to conform to the grade of Eighth avenue, on which map new grades of Ninth avenue appeared; another, a map or profile of the new grade of Ninth avenue. No work, however, had been done upon said avenue, in changing the grade, prior to the passage of the charter, and no contract had been made for such work. *Held*, that the work was not "in progress" within the meaning of the exception of such works in the provision of said charter (§ 91), requiring contracts for work not therein otherwise provided for, to be founded on sealed proposals and let to the lowest bidder; and, the work having been done without a contract let as prescribed, that an assessment therefor was invalid. *In re Weil.* 543

22. Also, *held*, that the work could not be considered "in progress" because other streets referred to in the act of 1871 had been actually graded or the work thereon was in progress when the charter went into effect. *Id.*

23. Also, *held*, that the power of the commissioner of public works, under said act of 1871, to do the work unrestricted by the contract system was not preserved by the provision of said charter (§ 73) vesting in the department of public works created by the charter the powers and functions previously possessed by the department of public parks or the department of public works. *Id.*

—— *In an action on contract to build sewers defendant set up as a counterclaim damages for breach of contract in not completing the work. Held, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it*

but this did not preclude it from insisting upon the counter-claim.
See Taylor v. *The Mayor.* (*Mem.*) 625

NON-RESIDENT.

Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant. (§ 116, sub. 2.) *Gotendorf* v. *Goldschmidt.* 110

NONSUIT.

1. When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit. *Painton* v. *No Cent. R. Co.* 7

2. Although the plaintiff in an action fails to make out his cause of action, on trial, the defendant is not, in all cases, entitled to have a verdict directed which will be a final bar to plaintiff's right of action; where the defense set up is a release from liability, and this is not made out so conclusively as to entitle defendant to have a verdict directed in his favor thereon, he is entitled to a nonsuit, not to a verdict. *Briggs* v. *Waldron.* 582

NUISANCE.

A wrong motive in erecting a structure otherwise lawful does not make the structure itself unlawful or a nuisance; an unlawful use thereof may be complained of and restrained, but the structure cannot be destroyed. *Chenango Bridge Co.* v. *Paige.* 178

OFFICE AND OFFICER.

Plaintiff was appointed an attendant of the Supreme Court by the board of supervisors of the county of New York, under the provision of the Code of Procedure (§ 28), requiring the "supervisors of the several counties" to provide the courts appointed to be held therein, with * * * attendants, * * * suitable and sufficient for the transaction of their business. *Held*, that he was "in office" within the meaning of the provision of the act of 1870 (§ 3, chap. 382, Laws of 1870), in reference to said county, which prohibits the board of supervisors of said county from "increasing the salaries of those now in office, or their successors; and that, therefore, an ordinance of said board increasing plaintiff's salary was illegal and void. *Rowland* v. *Mayor, etc.* 372

PARTITION.

1. Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant. (§ 116, sub. 2.) *Gotendorf* v. *Goldschmidt.* 110

2. Upon the petition of the plaintiff in a partition suit an order was made, as prescribed by said provision, appointing D. as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited, no steps having been taken by or on behalf of the infants. D. was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered. *Held*, that this was sufficient, both

under said provision of the Code and under the provisions of the Revised Statutes in reference to proceedings in partition (2 R. S. 317, § 3), which are made applicable to actions for partition under said Code (§ 448); and, it appearing that the court had jurisdiction of the subject-matter, that a sale in pursuance of a judgment in the action gave a valid title as against said infant defendants. *Id.*

PARTNERSHIP.

1. By articles of copartnership it was stipulated that in case of the death of one of the partners, the survivor should continue to carry on the business for the benefit of both parties, for a time specified after such death. *Held*, that the authority thus conferred, if valid and operative (as to which *quære*), did not authorize the survivor to bind the estate of the deceased by new accommodation indorsements, nor did it permit and make valid an indorsement of the firm executed by the survivor as a renewal of an indorsement made in the life-time of the deceased, and with his assent. *Nat. Bk.* v. *Bigler*. 51

2. The provision of the act of 1833 (chap. 281, Laws of 1833) in reference to transacting business under fictitious names, which prohibits a person from transacting business in the name of a partner not interested in the business, and which requires that where "& Co." is used it shall represent an actual partner, does not apply to or include the use of the real name of an actual partner although such a partner is under a disability at the time. *Zimmerman* v. *Erhard*. 74

3. Where, therefore, a firm is composed of a husband and wife, the latter being represented by the "& Co," in the firm name, in the absence of any intention to impose upon the public by obtaining undue credit, and conceding that a married woman cannot be a partner of her husband, this is not a violation of the statute. *Id.*

4. Plaintiff leased certain premises to a firm. Two of the partners subsequently left the firm and the premises, the partners remaining having by valid contract assumed and agreed to pay the rent thereafter accruing. In an action brought against the original members of the firm to recover such rent, it appeared that plaintiff was informed that the two partners were going out, and that the others were to remain and would pay the rent; but it did not appear that he was advised of any agreement by which those remaining were bound to pay the rent, or by which the legal relation of the retiring members of the firm to the common liability was changed. *Held*, that the evidence failed to establish the right of the retiring partners to be treated as sureties. *Palmer* v. *Purdy*. 144

5. S. & O., the defendants who continued the business, gave their notes to plaintiff for rent in arrears. These were accepted by him upon the express stipulation that the liability of G. & P., the other defendants, should not thereby be released, and with the reservation of his rights and remedies against them. *Held*, that the arrangement was not such an extension as discharged G. & P., even if the rights of sureties were accorded to them. *Id.*

PAYMENT.

Where in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defense of payment is interposed, the non-production of the bond by the plaintiff in evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover. *Bergen* v. *Urbahn*. 49

—— *When presumption of pay-*

ment does not arise from the taking of renewal notes.
See Nat. Bank v. *Bigler.* 51

See APPLICATION OF PAYMENTS.

PILOTS.

1. Under the English statutes in relation to compulsory pilotage in the port of Liverpool an owner of a vessel is not relieved from liability for damage to freight unless a pilot was in charge under the act, and was actually and necessarily engaged in the discharge of his duty. *Guiterman* v. *Liv., etc., Co.* 358

2. Where, therefore, a vessel had left its dock at Liverpool in charge of a pilot and anchored in the river Mersey to finish loading and to receive coal for a voyage to New York, and while at anchor an accident occurred causing the loss, *held*, that the owner was not excused from liability by said statute. *Id.*

PLACE OF TRIAL.

1. As an action under the manufacturing act (§ 15, chap. 40, Laws of 1848), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (Code of Civil Procedure, § 983) and must be tried in the county where the cause of action or some part thereof arose. *Veeder* v. *Baker.* 156

2. As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. *Id.*

3. The right of the defendant in such an action to have the place of trial changed to the proper county, where the venue is laid in another, is an absolute one, and his motion to secure that right cannot be defeated by proof showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial as stated in the complaint. *Id.*

4. *It seems* that the proper practice in such case is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change is authorized by the Code (§ 987), he must make his motion. *Id.*

5. In such an action where the venue had been laid in the wrong county defendant served with his answer a demand that the venue be changed to the proper county, and this not having been complied with, moved to change both on the ground that the wrong county was stated, and for the convenience of witnesses. Plaintiff demurred to one of the defenses set up in the answer. The demurrer and the motion were argued together, the former was overruled on the ground that the complaint did not state a cause of action, and the motion was denied. Plaintiff served an amended complaint; defendant answered, serving with his answer a new demand to change the place of trial to the proper county, this not having been complied with he moved to make the change, the motion was denied on the ground that a similar motion had been made and denied, and no leave to renew granted. *Held*, untenable; that as when the motion was first made the complaint stated no cause of action, the motion could and it may have been denied on that ground, and when a sufficient complaint was served defendant was entitled to make a new demand and another motion without leave of the court. *Id.*

PLEADING.

1. Special demurrers as known to the former practice were abrogated by the Code; and no pleading is now demurrable unless it is sub-

ject to one or more of the objections specified in the provisions of the Code, defining the grounds of demurrer. (Code of Civil Procedure, §§ 488 *et seq.*) *Marie* v. *Garrison.* 14

2. To sustain a demurrer to a complaint it is not sufficient that facts are imperfectly or informally averred, or that it lacks definiteness and precision, or that the material facts are argumentatively averred; it will be deemed to allege what can by reasonable and fair intendment be implied from the allegations. *Id.*

3. *It seems* that the remedy for indefiniteness is not by demurrer but by motion. (Code of Civil Procedure, § 546.) *Id.*

4. Plaintiffs' complaint alleged in substance that they were the owners in their own right and in trust for others, with full power of disposal, of certain shares of the stock of the P. R. R. Co.; that an action to foreclose a third mortgage on the road, brought in the interest of the defendant G., who owned a majority of the bonds secured by the mortgage, was pending, which action certain of the stockholders were defending, on the ground that the bonds were collusive and fraudulent; that some of the plaintiffs had filed a petition to come in and defend, when G., with a view to a compromise, promised by letter that in consideration of the relinquishment by plaintiffs and defendant D. of further opposition to the foreclosure, in case he purchased the road on foreclosure sale, he would, upon the plaintiffs organizing a successor company and complying with certain conditions specified, convey the road to them; that plaintiffs performed the preliminary obligations contained in said agreement to be performed on their part, and in consequence G. procured a decree of foreclosure, and a sale of the road was effected; that the decree of foreclosure and sale would not have been made without their cooperation and consent; that after the making of said agreement and in consideration of the surrender of the letter by plaintiffs, and of their consent to a modification of the terms of the agreement, G. agreed that, in case of a sale under the decree, he would become the purchaser, and would forthwith organize a successor company, and convey the road to it, and would deliver to plaintiffs in return for their stock an equal amount of paid-up stock of the new company; that the road was purchased on the foreclosure for the benefit of G., and a new company was organized, to which the property was conveyed; but that G. refused to perform his agreement to issue the new shares in exchange for plaintiffs' stock. Upon demurrer to the complaint, *held,* that its averments were sufficient to constitute a cause of action; that it alleged a sufficient consideration for the original promise of G., and the surrender of the option given thereby to plaintiffs was a sufficient consideration for the substituted agreement. Also, that the averment of a refusal by G. to issue new shares in exchange for the old stock implied a tender of the old shares. *Id.*

5. The complaint was also demurred to on the ground of a misjoinder of parties, in that plaintiffs' interests were distinct and several, and so they could not unite. *Held,* untenable; that it did not follow from the fact of an individual or several ownership by the plaintiffs of the shares in the old company that their interest in the contract with G. was not joint; that plaintiffs had a right to combine their shares, and to enter into contracts jointly, which was in fact done; that as to the stock held by plaintiffs as trustees, they could maintain an action in their own names, without setting out the trusts, at least that it did not appear on the demurrer that they were not so entitled. *Id.*

6. Plaintiff's complaint alleged in substance that there was a sum of money belonging to her in the official custody of the clerk of K. county, the same being the sur-

plus arising upon the foreclosure of a mortgage upon certain lands belonging to her in the town of N. L.; that an assessment for a local improvement had been in form laid upon said lands in pursuance of certain statutes which were unconstitutional and void and the assessment invalid; that a tax was levied upon the premises to pay such assessment and a warrant issued to the collector of said town, who, by virtue thereof, levied upon and took said money from the county clerk and paid it to the county treasurer to the credit of the town; that bonds of the town had been issued to provide for payment of the expenses of said improvement, which were valid obligations of the town, and the money so paid was applied to the payment of said bonds, and that said town had wrongfully taken and received such money, without the knowledge or consent of the plaintiff, and applied it to its own use, and had failed and neglected to pay over the same. *Held*, that the complaint set forth a good cause of action against the town, and that a demurrer thereto was improperly sustained. *Horn* v. *Town of New Lots*. 101

7. The fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as one *ex delicto*. *Sparman* v. *Keim* 245

8. Plaintiff's complaint alleged in substance that he is an infant; that induced by false and exaggerated representations of the defendant as to the profitable nature of his business, to wit, "that it would yield large profits," he was induced to become a partner, and invested $1,000 therein; that becoming satisfied of the falsity of the representations, he demanded his money back, which was refused, and he asked judgment for the amount. The only representation proved on the trial was "that it was a good paying business." The plaintiff was nonsuited on trial, on the ground that the cause of action stated in the complaint was in tort. *Held*, error; that the allegations of the complaint made a good cause of action on contract, as the agreement of partnership was one an infant could avoid, and having done so, plaintiff was entitled to recover back his money, less what he had received from the partnership. *Id.*

9. *It seems*, that a complaint in an action brought by a creditor against a stockholder of a corporation organized under the act authorizing the incorporation of gas-light companies (chap. 37, Laws of 1848) under that act, is defective when it omits to state that the capital stock had not been paid in and certificate filed at the time the debt was incurred. *Briggs* v. *Waldron*. 582

—— *Failure of defendant to set up non-performance of a contract as a defense does not preclude him from a counter-claim for damages.*

See Taylor v. *The Mayor*. (*Mem.*) 625

PLEDGE.

1 Plaintiffs made advances to N on pledge of the bill of lading of a cargo of corn, of which N. was general owner, and which was consigned to him at B. Upon arrival of the corn, plaintiffs consented that N. might designate the elevator in which it should be stored; this he did, and upon receiving from the master of the vessel the elevator receipt, instead of procuring a warehouse receipt in the names of plaintiffs, and delivering it to them, as according to usage it was his duty to do, he obtained such receipt in his own name. The plaintiffs knew that according to the usual course of dealing, the master would deliver the elevator receipt to the consignee on payment of freight, and that on such receipt a warehouse receipt would be issued to the consignee, or in the name of whom he should direct. They expected N. to pay the freight, and intended him to receive the elevator receipt. The corn arrived November 8th; plaintiffs paid no attention to its

possession until November 18th, when they demanded repayment of their loan. Meanwhile, N. had shipped the corn to New York by canal, and on the faith of the canal boat bills of lading obtained advances from defendants, who received the corn on arrival. *Held*, that conceding plaintiffs' claim could not be enforced as against defendants, as to which *quære*, yet it remained good as against N. or hiscreditors, and defendants would be entitled to protection against such claim only to the extent of their advances, and so far only as a lien on the corn or its proceeds was necessary to secure such advances; and, it appearing that defendants had in their hands other funds, belonging to N. upon which they had a lien for, and had the right to apply to the payment of, these advances, and which after notice of plaintiffs' claim they paid over to another on the order of N. *Held*, that plaintiffs were entitled to demand, and upon refusal to pay, to maintain an action to recover the corn or its proceeds. *Hazard* v. *Fiske*. 287

2. Also, *held*, that plaintiffs' right to have such other funds applied to cancel defendants' lien was superior to the title thereto of an assignee in bankruptcy of N., or to that of any person to whom N. might have assigned the same. *Id.*

3. Defendant, S. E. H., assigned to plaintiff a certificate of stock in a manufacturing corporation "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. W. H. S. E. H. was the wife of E. W. H., who, at the time the assignment was executed, was largely indebted to the plaintiff and was on the verge of actual insolvency. In an action to foreclose plaintiff's lien upon the stock pledged, *held*, that the assignment, by its terms, included and secured all demands had and held by plaintiff against E., after its execution, as well as those existing at that time; and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security, and that an extension of time, by renewals in the ordinary course of business, granted by plaintiff to E. W. H. for payment of any of the debts, did not discharge the lien upon the stock. *Mer. Nat. Bk.* v. *Hall*. 338

4. *It seems* that S. E. H. could at any time, by giving notice, have restricted the security to demands actually held by plaintiff at the time of notice, and thus have terminated her responsibility. *Id.*

5. Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. *Duncan* v. *Brennan*. 487

6. Nor can it be so held although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general accountcannot be invoked. *Id.*

7. Plaintiffs, who were bankers, loaned to B. Bros. & H. $10,000, upon the specific pledge of a quantity of whisky; this loan was paid in full. Prior and subsequent to this loan plaintiffs made other advances to said firm to a large amount. The whisky was levied on by B., defendant's testator, then sheriff, under attachments, against M. On the trial of an action to recover possession of the whisky, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whisky was the property of M.; this evidence was excluded. *Held*, error; that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them. *Id.*

8. Also, *held*, that as plaintiff had no right of possession at the time of the levy, a denial of a motion to dismiss the complaint was error. *Id.*

PRACTICE.

It seems, that the proper practice

where the venue in a local action is laid in the wrong county is to order the change upon defendant's motion, and then if plaintiff desires a change on the grounds upon which such change is authorized by the Code (§ 987) he must make his motion. *Veeder* v. *Baker*. 156

—— *Where upon pendency of appeal to this court from order denying motion to change venue, plaintiff moves cause for trial and takes judgment, a motion to set aside the judgment should be made in the Supreme Court; this court has no jurisdiction of it.*
See Veeder v. *Baker*. 163

See PLEADING.
CRIMINAL TRIAL.
TRIAL.

PRESUMPTION.

A person furnishing information to a mercantile agency as to his means and pecuniary responsibility is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him. *Eaton C. & B. Co.* v. *Avery*. 3

—— *Where presumption of payment does not arise from the taking of renewal notes.*
See Nat. Bk. v. *Bigler*. 51

PRINCIPAL AND AGENT.

1. One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority. *Alexander* v. *Cauldwell*. 480

2. It cannot be presumed that the agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in. *Id.*

3. As a general rule, and in the absence of an express agreement imposing a different liability, an agent engages simply for ordinary care and skill in the discharge of the duties of his agency, and is only liable to his principal for injuries resulting from a want thereof. *Loeb* v. *Hellman*. 601

4. The liabilities, however, of the agent may be enlarged by express contract, and he may undertake to insure his principal. *Id.*

—— *Authority of stock broker to sell and liability of, for negligence.*
See Harris v. *Tumbridge*. 92

—— *Insurance broker not agent for company in such sense as to bind it by notice to him.*
See Devens v. *M. & T. Ins. Co.* 168

See BROKER.

PRINCIPAL AND SURETY.

1. Where, in an agreement for an extension of the time of payment made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby. *Nat. Bk.* v. *Bigler*. 51

2. *It seems* that one of several original debtors may so contract with the others for their assumption and payment of the common debt, as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor. *Palmer* v. *Purdy*. 144

3. Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety. *Id.*

4. Plaintiff leased certain premises to a firm. Two of the partners subsequently left the firm and the premises, the partners remaining having by valid contract assumed and agreed to pay the rent thereafter accruing. In an action brought against the original members of the firm to recover such rent, it appeared that plaintiff was

informed that the two partners were going out, and that the others were to remain and would pay the rent; but it did not appear that he was advised of any agreement by which those remaining were bound to pay the rent, or by which the legal relation of the retiring members of the firm to the common liability was changed. *Held*, that the evidence failed to establish the right of the retiring partners to be treated as sureties. *Id.*

5. S. & O., the defendants who continued the business, gave their notes to plaintiff for rent in arrears. These were accepted by him upon the express stipulation that the liability of G. & P., the other defendants, should not thereby be released, and with the reservation of his rights and remedies against them. *Held*, that the arrangement was not such an extension as discharged G. & P., even if the rights of sureties were accorded to them. *Id.*

6. Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (§ 338), containing among other things this provision, that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General Term in September, 1865, and in October, 1865. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the General Term *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court. *Church* v. *Simmons.* 261

7. *It seems* that if after judgment of affirmance the defendant continued in possession by permission of the plaintiff under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant. *Id.*

8. *It seems* also that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts. *Id.*

9. *It seems* also that the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking on the second appeal. *Id.*

QUESTIONS OF LAW AND FACT.

1. In an action upon a policy of fire insurance, it appeared that the building was destroyed by fire April 3, 1875. It was rented and occupied up to April 1st. The tenant had permission "to keep his things" there after that time, and as a witness for defendant he testified, "my occupancy ceased when my things were burned up;" he also testified that he occupied as tenant the barn and carriage house, which were also insured by the policy, and continued so to do after the fire. Another witness, who went to the house to see about repairs the day before the fire, testified that he saw articles of furniture in one of the rooms, and others were locked. *Held*, that the evidence justified the submission of the question as to whether the house was "vacant and unoccupied," to the jury. *Woodruff* v. *Imp. F. Ins. Co.* 133

2. In an action to recover damages for alleged negligence, plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. *Payne* v. *Troy & B. R. R. Co.* 572

—— *In action against stockbroker when question for jury.*
See Harris v. *Tumbridge.* 92

—— *Where negligence a question of fact.*
See Wooley v. *G. S. & N. R. R. Co.* 121

—— *When question of contributory negligence is one of fact.*
See Byrne v. *N. Y. C. & H. R. R. R. Co.* (*Mem.*) 620

RAILROAD CORPORATIONS.

1. Plaintiff, a brakeman in defendant's employ, was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. In an action to recover damages it appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant, or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to. *Painton* v. *No. Cent. R. R Co.* 7

2. There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury. *Id.*

3. Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable; that defendant had put salt on its track which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. In an action to recover damages, *held*, that the evidence justified the submission of the question of defendant's negligence to a jury. *Wooley* v. *Grand St., etc., R. R. Co.* 121

4. Plaintiff knew that there was a switch in that locality, but it did not appear that he had in mind its precise location; he was not thinking particularly of the switch at the moment of the accident; but, thinking the place was one dangerous to cross without care, was going slowly and using great caution. *Held*, that he was not, as matter of law, chargeable with contributory negligence; but that the question was one for the jury. *Id.*

5. The evidence was to the effect that, as between the defendant and the other street railway, with whose tracks the switch made a connection, the defendant was to keep the switch and the abutting pavement in good condition. The court was asked to charge that if the switch was properly put down defendant was not chargeable; the request was refused, but the court charged that if the switch was skillfully put down and was in itself no obstruction, which a person could not, with ordinary care and prudence, avoid, the proposition would be correct. *Held*, no error; that although the switch was a proper one and well laid down, if it subsequently, from any cause, was raised to an undue height above the pavement, or the pavement had sunk unduly below it, it was defendant's duty to put it in good condition. *Id.*

6. The T. and N. R. R. Co. executed a mortgage on its road to secure its bonds to defendant, the U. T. Co., as trustee for the bondholders, and bonds were prepared for issuing, each of which contained a clause that it should not become obligatory until authenticated by a certificate indorsed thereon duly signed by said trustee. Said bonds were signed by the proper officers of the company, but before the company's seal was affixed or the required certificate attached, a portion of them were stolen, a seal and certificate forged thereon, and the bonds sold; plaintiffs purchased them for a valuable consideration and in good faith. The T. and N. Co. was consolidated with defendant, the M., K. and T. R. Co.; by the agreement of consolidation the latter was to take up outstanding bonds of the former company, issuing its own in exchange. In an action to compel such an exchange for plaintiffs' bonds, *held*, that plaintiffs were bound by the condition in the bonds; that the certificate was essential to their validity; that neither the payment of value nor good faith on their part created a cause of action; and that the defect in the bonds was not waived by the agreement of consolidation; also, that the failure of the obligor, after discovery that the bonds had been lost or stolen, to notify the public of that fact did not constitute negligence making it liable. *Maas* v. *M., K. & T. R. Co.* 223

7. Also, *held*, that the plaintiffs were not entitled to have returned to them said forged bonds which had been delivered for the purpose of exchange; that plaintiffs had no title to them, as they had never been issued or put in circulation by defendants, and so were the property of the T. and N. Co. *Id.*

8. In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act (§ 10, chap. 140, Laws of 1850, as amended by chap. 282, Laws of 1854), making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's *status* as a creditor and of the amount due him. *Stephens* v. *Fox.* 313

9. While plaintiff was driving his mare across the track of defendant's road at the intersection of two streets in the city of T., her foot caught between the planking and one of the rails and she was injured. Upon the trial of an action to recover damages, plaintiff's evidence was to the effect that there was over three and one-fourth inches between the plank and the rail, while only two and one-quarter inches was required for the passage of the flanges of the car wheels, and because of this the horse's hoof got into the open space and the toe calk caught under the rail; that the plank was from one-fourth to three-eighths of an inch higher than the top of the rail; and that the crossing was constructed differently from others upon defendant's road and upon other railroads. Plaintiff was nonsuited on the ground that there was no evidence of negligence on the part of defendant. *Held*, error; that the question of negligence was one of fact for the jury. *Payne* v. *Troy & B. R. R. Co.* 572

——*Liability of, for negligence and when question of contributory negligence is one of fact.* *Byrne* v. *N. Y. C. & H. R. R. R. Co.* (*Mem.*) 620

RATIFICATION.

—— *Unauthorized levy and sale under execution, what does not amount to ratification of, so as to bind obligors in bond of indemnity.*
See Clark v. *Woodruff.* 518

—— *Where bond and mortgage of an attorney of one of the parties in a partition suit was deposited in good faith by the referee appointed to sell, as part of a fund directed to be deposited with and invested by the county treasurer in trust, and the cestuis que trust with full knowledge for years re-*

ceived the income. Held that they could not repudiate the investment and impose it upon the referee.
See Wiggins v. *Howard.* (*Mem.*) 613

RECEIVER.

—— *When lien of junior mortgagee upon rents and profits obtained by appointment of receiver in foreclosure suit, is superior to equities of prior mortgagee.*
See Ranney v. *Peyser.* 1

RECORDING ACT.

1. An assignee in good faith and for a valuable consideration of a recorded mortgage gets no preference over a prior unrecorded deed or mortgage by reason of such record, when his assignor could not claim it by reason of notice or any other equity. *Decker* v. *Boice.* 215

2. The contrary rule declared in *Jackson* v. *Van Valkenburgh* (8 Cow. 260), held to be no longer in force. *Id.*

3. Such assignee is, however, a purchaser, and his assignment is a conveyance under the Recording Act. (1 R. S. 756, §§ 37, 38.) *Id.*

4. If, therefore, the assignment is recorded before the recording of such prior deed or mortgage, he thereby obtains a preference; and an unrecorded conveyance is as to him void under said act. *Id.*

5. In an action for partition, plaintiff claimed title under a sale on foreclosure of two mortgages, both executed April 1, 1872. Two other mortgages were executed at the same time, all the mortgagees mutually agreeing that neither mortgage should have priority over either of the others, but that all should be equal liens. The mortgages under which plaintiff claimed were recorded in December, 1872; they were both assigned, the assignees taking for a valuable consideration and in good faith, and the assignments were recorded, one in January, 1874, the other in June, 1876. The other two mortgages were recorded, one in July, the other in August, 1877. *Held*, that the assignees of plaintiff's mortgages were subsequent purchasers under the Recording Act, and upon recording their assignments acquired a preference over the other mortgages; and that, therefore, plaintiffs acquired a valid title under the foreclosure sale. *Id.*

—— *Recovery of possession of real property.*

See EJECTMENT.

REFERENCE.

1. The Supreme Court has no power to grant an order, on application of the referee in an action, requiring the plaintiff to pay the referee's fees and take up the report. *Geib* v. *Topping.* 46

2. *It seems* that as referees act voluntarily, their rights are to be enforced according to the principle of the law of contracts. *Id.*

3. *It seems*, also, that a referee is not bound to part with his report without payment of his legal fees, and when he has his report ready within the statutory time and offers to deliver it on payment of such fees, the offer will be deemed a sufficient delivery to prevent a forfeiture of fees declared by section 1019 of the Code of Civil Procedure. *Id.*

4. Where the findings of fact, by a referee, conflict, the defeated party is entitled to those most favorable to him and may rely upon them in aid of exceptions to the referee's conclusions of law. *Schwinger* v. *Raymond.* 193

5. Where findings contained in the case, as settled by a referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand. (Code of Civil Procedure, § 997.) *Id.*

—— *Where bond and mortgage of an attorney of one of the parties in a*

partition suit was deposited in good faith by the referee appointed to sell, as part of a fund directed to be deposited with and invested by the county treasurer in trust, and the cestuis que trust with full knowledge for years received the income. Held that they could not repudiate the investment and impose it upon the referee.

See Wiggins v. *Howard.* (*Mem.*) 613

RELEASE.

In an action to recover the amount of a check drawn by C., plaintiff's assignor, to the order of defendant, and alleged to have been delivered to the latter to be used in purchasing a draft for the drawee, the defendant averred in his answer that the check was intended as a payment in part of a claim which C. "morally owed" the defendant, growing out of a fraud perpetrated by C. in inducing defendant to take a fraudulent note; the alleged facts in reference thereto being set forth in the answer, which also averred that defendant settled the claim with C. on his promise that he would at some time pay the loss. On the trial, after L., as a witness for plaintiff, had testified that the check was given to purchase a draft, defendant's counsel sought to show by him, on cross-examination, the facts of the fraud set forth in the answer; this was objected to and the evidence excluded. After defendant, as a witness in his own behalf, had testified that the check was given as a payment upon the claim arising out of the fraudulent note, his counsel offered to prove by him the transaction in regard to said note substantially as alleged in the answer. This was objected to and excluded. Before the court ruled upon the offer it was conceded that a release under seal, which was produced, was executed by defendant with full knowledge of the facts; the release recited that in consideration of the agreement of the other parties to indemnify defendant from the debts of a firm named during the time he was a member he released C. from all demands "by way of checks, notes or otherwise." *Held*, that the evidence offered was properly rejected; that evidence of the details of the fraud could not legitimately tend to confirm defendant's version. *Canaday* v. *Krum.* 67

REMEDIES.

Where a common carrier performs his contract to transport and deliver goods, a payment of the freight or a submission to judgment therefor does not preclude the owner of the goods from recovering damages for injuries thereto while *en route*; he may pay the freight and sue for the damages, or set up his damages by way of counter-claim in an action to recover the freight or he may bring a cross-action. *Schwinger* v. *Raymond.* 192

—— *Remedy for indefiniteness in pleadings is by motion not by demurrer.*

See Marie v. *Garrison.* 14

—— *An action is not maintainable against a department of a city government; the remedy is by mandamus not by action.*

See Swift v. *Mayor, etc.* 523

REPLEVIN.

See CLAIM AND DELIVERY

RESCISSION.

1. A vendee, entitled to rescind a sale for fraud, must act promptly on discovery of the fraud, and restore or offer to restore the property. By dealing with it as owner after such discovery he deprives himself of this remedy. *Schiffer* v. *Dietz.* 300

2. Where fraud upon the part of the vendor is claimed on the sale of real estate, a continuance in possession by the vendee after discovery of the fraud is evidence of an intent to abide by the contract. *Id.*

3. Defendant, in execution of a contract to convey certain premises to plaintiff by deed, with warranty free and clear from all incum-

brances, executed a conveyance May 10, 1872. At the time of the execution of the contract and of the delivery of the deed, defendant was married but his marriage was kept secret; defendant then supposed it to be invalid. Plaintiff had no knowledge of it until the fall of 1873, and defendant knew that plaintiff believed him to be unmarried. In an action to rescind the sale and conveyance, *held*, that defendant's belief in the invalidity of the marriage did not justify his omission to disclose the fact to plaintiff, as if void, or if it could be annulled, the fact of the formal marriage would be a cloud on title; that, therefore, a finding of fraud was justified, and on the discovery thereof plaintiff was entitled to demand a rescission. *Id.*

—— *Of contracts, what does not amount to.*
See Kidd v. *McCormick.* 391

RIPARIAN OWNER.

1. The bed and banks of a fresh water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement. *Chenango Bridge Co.* v. *Paige.* 178

2. The legislature, except under the power of eminent domain, can interfere with such a river only for the purpose of regulating, preserving and protecting the public easement. *Id.*

3. Any person owning land on both sides of the river may without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement. *Id.*

4. Such owner, however, cannot, without legislative authority, maintain a bridge or ferry for public use. *Id.*

5. Plaintiff was the owner of a mill operated by water power furnished by a creek. Defendant, who was a riparian owner above, under a claim of right, diverted the waters of the creek, conveying them by pipes to reservoirs whence its locomotives were supplied with water. The jury found, on sufficient evidence, that the water so diverted from the creek was sufficient "to perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he has sustained damage to a substantial amount. *Held*, that plaintiff was entitled to maintain an action to recover the damages sustained, and restrain such diversion *Garwood* v. *N. Y. C. & H. R. R. R. Co.* 400

RULES.

Notwithstanding the provision of the Code of Civil Procedure (§ 791) giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of Rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc. *Taylor* v. *Wing.* 527

SALES.

1. Where separate purchases of goods are made at different times upon a credit for a specified time, the different sales do not constitute an entire and indivisible demand, but a cause of action accrues when the term of credit expires as to any one sale, and the vendor may bring separate actions for each sale. *Zimmerman* v. *Erhard.* 74

2. The pendency of an action, therefore, to recover for goods so sold at one date is not a defense to an action for goods sold at a subsequent date. *Id*

3. The rendering of an account by the vendor containing all the items does not change the nature of the contracts, or show that the transactions were not separate and distinct. *Id.*

4. A vendee, entitled to rescind a sale for a fraud, must act promptly on discovery of the fraud, and restore or offer to restore the property. By dealing with it as owner after such discovery he deprives himself of this remedy. *Schiffer* v. *Dietz*. 300

5. Where fraud upon the part of the vendor is claimed on the sale of real estate, a continuance in possession by the vendee after discovery of the fraud is evidence of an intent to abide by the contract. *Id.*

SHERIFF.

1. A judgment of foreclosure directing the sale of mortgaged premises by the sheriff is a "mandate" in his hands within the meaning of the provision of the Code of Civil Procedure prescribing the duties of an outgoing sheriff (§ 184, subd. 4), and an advertisement of the premises for sale is a "seizure" within said provision. *Un. Dime Sav'gs Inst'n* v. *Anderson*. 174

2. Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, advertised premises for sale upon a day after his term had expired, *held*, that he had authority and was bound to proceed with and complete the sale. *Id.*

3. Where in an action against a sheriff for a failure to return a certain execution, defendant proved, in mitigation of damages, that prior to the return day the judgments were levied upon by virtue of attachments issued to him against the judgment creditor, *held*, that the fact that the sheriff failed to make a valid levy by virtue of the execution did not destroy or weaken the effect of the proof in mitigation; that it was immaterial whether the failure to return was because of a neglect to levy, or arose after levy and collection; in either event, while the attachments remained in force, plaintiff was only entitled to nominal damages. *Wehle* v. *Conner*. 231

STATUTES.

——*Chap.* 281, *Laws of* 1833.
See Zimmerman v. *Erhard*, 74.
——*Chap.* 741, *Laws of* 1870.
See Clarke v. *Gibbons*, 107.
——*Chap.* 40, *Laws of* 1848.
See Veeder v. *Baker*, 156.
——*Chap.* 119, *Laws of* 1808.
——*Chap.* 164, *Laws of* 1865.
——2 *R. S.* 602, § 66.
See C. B. Co. v. *Paige*, 178.
——*Chap.* 335, *Laws of* 1873.
See Davies v. *The Mayor*, 207.
——1 *R. S.* 756, §§ 37, 38.
See Decker v. *Boice*, 215.
——*Chap.* 390, *Laws of* 1879.
See People ex rel. v. *Dutcher*, 240.
——*Chap.* 580, *Laws of* 1872.
——*Chap.* 446, *Laws of* 1857.
——*Chap.* 308, *Laws of* 1861.
See Baird v. *The Mayor*, 254.
——1 *R. S.* 768, § 6.
See Risley v. *Phenix Bank*, 318.
——*Chap.* 478, *Laws of* 1862.
See Post v. *Campbell*, 279.
——*Chap.* 140, *Laws of* 1850.
——*Chap.* 282, *Laws of* 1854.
See Stephens v. *Fox*, 313.
——*Chap.* 382, *Laws of* 1870.
See Rowland v. *The Mayor*, 372.
——*Chap.* 137, *Laws of* 1870.
——*Chap.* 312, *Laws of* 1874.
——*Chap.* 313, *Laws of* 1874.
See In re Marsh, 431.
——*Chap.* 122, *Laws of* 1876.
See Cowley v. *People* 464.
——*Chap.* 129, *Laws of* 1872.
See Minick v. *City of Troy*, 514.
——*Chap.* 335, *Laws of* 1873.
——*Chap.* 755, *Laws of* 1873.
See Swift v. *The Mayor*, 528.
——*Chap.* 697, *Laws of* 1867.
——*Chap.* 52, *Laws of* 1852.
See In re Walter, 538.
——*Chap.* 335, *Laws of* 1873.
——*Chap.* 226, *Laws of* 1871.
See In re Weil, 543.
——*Chap.* 200, *Laws of* 1848.
——*Chap.* 375, *Laws of* 1849.
——*Chap.* 90, *Laws of* 1860.
——*Chap.* 172, *Laws of* 1862.
——*Chap.* 37, *Laws of* 1848.
See Wood v. *Wood*, 575.
See LIMITATION OF ACTIONS.
RECORDING ACT.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STIPULATION.

Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case. *Briggs* v. *Waldron.* 582

—— *That copies of letters might be produced with affidavit of mailing with same effect as originals, and that party would not controvert contents of letters thus proved, does not preclude the party from showing that the letters were not received.*

See Lockwood v. *Quackenbush.* (*Mem.*) 607

STOCK.

—— *Agreement of party to purchase railroad on foreclosure and to organize new company and to exchange new stock for the old, when valid.*

See Marie v. *Garrison.* 14

STOCKBROKER.

1. Plaintiff purchased, through the agency of defendant, a stock option or privilege known as a "straddle," which secured to her the right to demand of the seller, at a price stated, a certain number of shares of a specified stock, or to require him to take said stock at the same price, within sixty days. Plaintiff was induced to make the purchase by printed circulars issued by defendant, explaining the nature of a "straddle," offering to purchase one of his selection upon payment of a specified sum, and guaranteeing that fluctuations in the stock during the pendency of the contract would amount to eight per cent, and in case it did not, agreeing to refund the amount paid, less commissions. Plaintiff authorized defendant, as her agent, to exercise the option. On the next day after the purchase defendant sold the stock "short," which resulted in a loss. In an action to recover damages, *held*, that defendant had no authority to make the sale; that in the absence of any directions from plaintiff it was defendant's duty to have closed the contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care; that the question of negligence and want of skill and care in the performance of his duty as agent was properly submitted to the jury, and authorized a recovery. *Harris* v. *Tumbridge.* 92

2. Defendant claimed on appeal that this was a gambling transaction, and as such prohibited by statute. No such defense was set up in the answer. *Held*, that the contract was not of necessity a wager contract; that this was for defendant to prove; and that the fact that it might have been so did not dispense with the necessity of proving that it was. *Id.*

3. The price of the stock from day to day during the sixty days was shown. *Held*, that the question as to the amount of damages was for the jury. *Id.*

4. Defendant offered evidence that it was common for parties purchasing "straddles" to operate in stock, holding the straddle as security; this was excluded, and the court charged that plaintiff, in order to be bound by any such custom, must have been aware of it. *Held*, no error. *Id.*

STOCKHOLDER.

1. Where a stockholder receives from a corporation dividends declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated. *Peckham* v. *Van Wagenen.* 40

2. *It seems* that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company. *Id.*

3. In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act (§ 10, chap. 140, Laws of 1850, as amended by chap. 282, Laws of 1854), making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's *status* as a creditor and of the amount due him. *Stephens* v. *Fox.* 313

4. The effect of said provision is not to impose any penalty or original liability upon the stockholder, but simply to confer upon the creditor of the corporation a right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation, for his unpaid subscription. The creditor claims through the corporation, and if he shows that he is a creditor, by evidence binding and conclusive against it, the evidence is competent against the stockholder. *Id.*

5. In such an action, on trial before a referee, after the case was closed is was reopened by order of the court for the sole purpose of allowing defendant to put in evidence certain exhibits and records; on the rehearing, defendant offered oral evidence to sustain a counterclaim. *Held*, that it was properly excluded. *Id.*

6. The liability of a stockholder of a corporation organized under the act authorizing the incorporation of gas-light companies (chap. 37, Laws of 1848) to the creditors of the company imposed by said act (§ 10) until the whole capital stock has been paid in and certificate thereof filed, is not limited to the original incorporators, but applies as well to those becoming stockholders after the incorporation. *Briggs* v. *Waldron.* 582

7. *It seems*, that the complaint in an action brought by a creditor against a stockholder, under that act, is defective when it omits to state that the capital stock had not been paid in and certificate filed at the time the debt was incurred. *Id.*

8. *It seems*, also, that the certificate of a clerk of the proper county as to the non-filing of the certificate is defective where it omits to state that diligent search for it has been made in his office, as required by section 921 of the Code of Civil Procedure. *Id.*

SUPPLEMENTARY PROCEEDINGS.

—— *Where order in supplementary proceedings made in district where venue was laid and roll filed, appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides; such justice has power to change referee, and the exercise of this power is discretionary and not reviewable here.* *See Pardee* v. *Tilton.* (*Mem.*) 623

SUPREME COURT.

—— *Has no power to let to bail one charged with petit larceny.* *See People ex rel.* v. *Dutcher.* 240

SURROGATE'S COURT.

1. Where, upon application for letters of administration with the will annexed, it appears that there are no assets, or the presumption arises from lapse of time that there are no assets of the testator in existence, which can be identified and reached by the administrator, and there is no claim in respect to them which can be enforced, and no other reason appears, the granting of letters cannot be claimed as a matter of right, and the application may be properly refused. *Van Giessen* v. *Bridgford.* 348

2. B. died in 1663, in the (now) county of Albany, leaving a will of real and personal estate. By the will her children and grandchildren were nominated and in-

stituted as "her sole and universal heirs;" no person was named as executor. On application to the surrogate of said county for letters of administration with the will annexed, the applicant presented a certificate of the clerk of the Court of Appeals to the effect, that upon examination of the records, etc., of the former Court of Prerogatives and Court of Probate, he was unable to find any record of letters of administration on the estate of B. The oldest of these courts had no existence until over twenty years after the death of B. Also, a certificate of the clerk of Albany county, that no record of such letters could be found in his office. Proof was given of conveyances by the heirs and those claiming to represent them, of real estate of which B. died seized. A family Bible and a pair of ear-rings were produced by a witness who testified in substance, that her mother was a descendant of B.; that the articles produced came to her mother from a son of B., and that her mother told her that the Bible was once owned by B. *Held*, that the application was properly denied; that it may and should be presumed that administration had been had of the estate, or that the rights and interests of all the parties interested had been satisfactorily adjusted between them, as when the testator died there were courts in the New Netherlands (which embraced what is now the city of Albany) having probate jurisdiction, which jurisdiction has been continued from that time down in those and other courts; that the certificates produced did not rebut such presumption. Also, that as the evidence tended to show that the instituted heirs accepted the inheritance, having executed conveyances of the real estate, and as according to the civil law then in force, the said heirs became, upon such acceptance, absolutely bound to pay debts and perform the directions of the will, after the lapse of two centuries the surrogate was not only justified in deciding, but was bound to decide, that the will had been executed, and that there were no goods, etc., unadministered. *Id.*

3. The will directed that the "four first born children" of the testator "shall divide out of their father's property the sum of one thousand guilders, to be paid by them out of the proceeds of a certain farm * * * before any other division takes place." *Held*, that this did not work an equitable conversion of the farm from real estate into personalty; that the distinction in the English law between the descent of real and the distribution of personal estate, upon which the doctrine of equitable conversion was founded, did not exist in the law which prevailed in New Netherlands at the time the will was made; also, that the effect of the provision was simply to create a charge upon the land in the hands of the devisees; and that assuming that by implication a power and duty was imposed on the "universal heirs" to sell, this power would not devolve upon an administrator with the will annexed. *Id.*

TENANTS IN COMMON AND JOINT TENANTS.

1. The fact of the possession and use by one of two tenants in common of personal property, of the property so held, even though it prevents the possession and use by the other, furnishes no ground to the latter for an action for conversion. *Osborn* v. *Schenck.* 201

2. *It seems*, however, that if the possession develops into a destruction of the property, or of the interest of the co-tenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment, or if it ends in a sale of the whole property, ignoring the rights of such co-tenant, then a conversion is established. *Id.*

3. A purchaser, however, from the co-tenant who has assumed to sell the whole property is not made

liable simply from his purchase and claim to be sole owner. *Id.*

4. Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants gave them, as security, a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half, and plaintiff the other half. The payments stipulated in the mortgage were fixed so as to correspond, in amounts and dates, with the rents reserved in the lease which were looked to, to discharge the mortgage debt. In an action for conversion of plaintiff's interest, *held*, that the taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P.; that the effect of the mortgage was simply to vest the interest of P., upon default, in defendants. *Id.*

5. Defendant H. B. S., after default, removed the machine from the possession of the lessees, claiming a right so to do. It appeared that no demand was made upon him before suit brought, and until after that time he neither did nor said any thing in denial of plaintiff's right as co-tenant. *Held*, that the taking possession was simply the exercise of defendants' rights as co-tenants, and neither made the defendants jointly nor H. B. S. individually liable. *Id.*

6. Replevin will not lie by one tenant in common of a chattel against another for taking the chattel, and if one of them sells his interest to a third party he has the right to deliver the chattel to the purchaser, and neither he nor any one assisting him in so doing is liable to an action. *Hudson* v. *Swan.* 552

TOWNS.

1. Bonds issued in pursuance of a statute for and in the name of a town, to defray the expenses of a local improvement, are not necessarily invalid because of illegality of the provisions in the act for the levying of an assessment to pay the bonds. *Horn* v. *Town of New Lots.* 100

2. An action for moneys had and received is maintainable against a town to recover moneys of another wrongfully taken by it and applied to its own use. *Id.*

3. Plaintiff's complaint alleged in substance that there was a sum of money belonging to her in the official custody of the county clerk of K. county, the same being the surplus arising upon the foreclosure of a mortgage upon certain lands belonging to her in the town of N. L.; that an assessment for a local improvement had been in form laid upon said lands in pursuance of certain statutes which were unconstitutional and void and the assessment invalid; that a tax was levied upon the premises to pay such assessment and a warrant issued to the collector of said town, who, by virtue thereof, levied upon and took said money from the county clerk and paid it to the county treasurer to the credit of the town; that bonds of the town had been issued to provide for payment of the expenses of said improvement, which were valid obligations of the town, and the money so paid was applied to the payment of said bonds, and that said town had wrongfully taken and received said money, without the knowledge or consent of the plaintiff, and applied it to its own use, and had failed and neglected to pay over the same. *Held*, that the complaint set forth a good cause of action against the town, and that a demurrer thereto was improperly sustained. *Id.*

TRIAL.

1. Plaintiff's sleigh was upset by striking a switch in defendant's road. In an action to recover damages, after the court had charged, in substance, that the switch used was not in itself objectionable, but was only so if found by the jury to have been, at the time, too high to be compatible with defendant's

right to a reasonable use of the street and to have been an obstruction, was asked by defendant's counsel to instruct the jury, that defendant was not chargeable with negligence in putting down the switch he did, that the switch used was not an obstruction in law, properly laid. The court replied it would leave that to the jury. *Held*, that the request and answer must be considered in view of what the court had already charged, and so considered was not error. *Wooley* v. *Grand St. &c. R. Co.* 121

2. An action to recover a deficiency arising on foreclosure was noticed and moved for trial at Special Term. Before the counsel for plaintiff opened his case, defendants' counsel "objected to the jurisdiction of the court and demanded a jury trial." The court reserved its decision, and the parties proceeded with the trial; evidence was given on both sides and the case submitted to the court. It did not appear, by the case, that either party asked the court to decide the question so reserved or objected to finishing the trial before him. *Held*, that the action was one at law and defendants were entitled to a jury trial; but that by completing the trial without insisting upon a ruling as to their right to a jury, they waived that right. *Hand* v. *Kennedy*. 149

3. Also, *held*, that an exception, filed after the decision of the action, to the failure of the court to decide the question, was not available. *Id.*

4. *It seems*, that defendants should have insisted upon a ruling, and if the court ruled adversely to them, or if it declined to rule at all, or reserved its decision, should have excepted; or as soon as the nature of the case was developed, should have insisted upon a ruling and taken an exception. *Id.*

5. Plaintiff's complaint alleged in substance that he is an infant; that induced by false and exaggerated representations of the defendant as to the profitable nature of his business, to wit, "that it would yield large profits," he was induced to become a partner, and invested $1,000 therein; that becoming satisfied of the falsity of the representations he demanded his money back, which was refused, and he asked judgment for the amount. The only representation proved on the trial was "that it was a good paying business." The plaintiff was nonsuited on trial on the ground that the cause of action stated in the complaint was in tort. *Held*, error; that the allegations of the complaint made a good cause of action on contract, as the agreement of partnership was one an infant could avoid, and, having done so, plaintiff was entitled to recover back his money, less what he had received from the partnership. *Sparman* v. *Keim*. 245

6. Defendant employed plaintiff, a broker, to sell the steel rails of its manufacture to the G. T. R. R. Co. After various unsuccessful negotiations for a sale, carried on during a period of four months, between that company and plaintiff, during which defendant had fixed its prices several times, upon receipt of a telegram from said company, asking upon what terms one thousand tons of defendant's rails would be delivered, plaintiff telegraphed to defendant asking its lowest terms. Defendant declined to fix a price or to negotiate farther through plaintiff; and the latter thereupon telegraphed to the G. T. R. R. Co. that defendant declined to name a price. Subsequently a sale was made by defendant to said company through another broker. Upon the trial of an action to recover commissions the court was requested to charge that defendant had the right, under the circumstances, to refuse to use the services of plaintiff if the action was taken in good faith and without intent to deprive him of his commissions. The court so charged, with the qualification, however, that defendant had no right, acting either in good or bad faith, to avail itself of what plaint-

iff had done, to make a sale through other agencies. *Held*, that the qualification was error; that defendant had the right to terminate the agency as it did; and, if done in good faith, plaintiff had no right to compensation although his efforts were of benefit in the subsequent successful negotiation. *Sibbald* v. *Bethlehem Iron Co.* 378

7. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own. *People ex rel. Phelps* v. *Oyer and Terminer.* 436

8. The range and extent of a cross-examination is, as a general rule, within the discretion of the court, subject to the limitation that it must relate to matters pertinent to the issue, or which tend to discredit the witness or impeach his moral character. *Id.*

9. Where this limitation has been regarded, this court cannot interfere, save where there has been an abuse of discretion. *Id.*

10. In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist. *Cowley* v. *People.* 465

11. In an action for negligence against a municipal corporation it appeared that the injury was caused by the wheel of the wagon in which plaintiff was riding running into a hole in a street. The court after it had charged, in substance, that plaintiff could not recover if her negligence had in any manner contributed to the injury, and that she was responsible for the conduct of the driver, her son, was asked by defendant's counsel to charge that "if the hole was one which might have been seen by the plaintiff or her son and readily avoided by the ordinary exercise of their eyes, the failure to avoid it constituted negligence." The court replied that this was substantially correct, save the expression "might have been seen," as to which he charged, in substance, that if, in the use of ordinary care, the hole ought to have been discovered, plaintiff could not recover. At the close of the charge of the court, defendant's counsel excepted to the court's "statement to the jury of the evidence or the supposed evidence connected with the accident," on the ground that it was "stated too strongly." *Held*, that the exception was not sufficient to bring up any question for review. *Minick* v. *City of Troy.* 514

12. Where, in the complaint and upon the trial of an action to recover possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and, in any event, before the lien can be restored, the false claim of title must be abandoned, the title of the true owner conceded and the claim reduced to one of lien. *Hudson* v. *Swan.* 552

13. Although the plaintiff in an action fails to make out his cause of action, on trial, the defendant is not, in all cases, entitled to have a verdict directed which will be a final bar to plaintiff's right of action; where the defense set up is a release from liability, and this is not made out so conclusively as to entitle defendant to have a verdict directed in his favor thereon, he is entitled to a nonsuit, not to a verdict. *Briggs* v. *Waldron.* 582

—— *When reception of evidence tending to discredit a witness is in the discretion of the court.*

See Canaday v. *Krum.* 67

See NONSUIT.
CRIMINAL TRIAL.

TROVER.

See CONVERSION.

TROY (CITY OF).

1. The charter of the city of Troy (§ 10, chap. 129, Laws of 1872) provides that no civil action shall be brought against the city for injuries to person or property "unless it appears that the claim for which the action was brought was presented to the comptroller with an abstract of the facts out of which the cause of action arose, * * * and that the comptroller did not, within sixty days, audit the same." Plaintiff presented a petition, as required, setting forth the facts and claiming damages to the amount of $10,000 for injuries alleged to have been caused by the negligent omission of the city to keep one of its streets in repair. The claim not having been audited as prescribed, this action was brought. The complaint alleged, substantially, the same facts as the petition and claimed $5,000 damages. *Held*, that the word "claim," and the phrase "cause of action," related to the same thing; that although the amount of compensation was different, the claim presented in the petition and the cause of action set forth in the complaint were identical; and that there was a sufficient compliance with the provisions of the charter. *Minick* v. *City of Troy*. 514

TRUSTS AND TRUSTEES.

1. Plaintiff and defendants McC. entered into a contract by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase-money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral security for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds, *held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. *Kidd* v. *McCormick*. 391

2. Plaintiff, before bringing this action, foreclosed his mortgages, bidding in the premises and obtaining judgments for deficiencies. *Held*, that neither the taking possession and completing the buildings, nor the foreclosures worked a rescission of the contract on the part of plaintiff; also that a reservation of said contract in the foreclosure judgments was not necessary. *Id.*

3. Also, *held*, that plaintiff was entitled to recover for expenditures made after the foreclosure sales in completing the buildings. *Id.*

4. In an action against the trustees of a corporation to charge them with a debt of the corporation because of an omission to make and file its annual report, it appeared that it was organized for the purpose of mining coal and bringing it to New York for its stockholders and for sale, and this was stated in its certificate of incorporation. The treasurer of the corporation wrote to plaintiffs under the heading of the corporate name, stating that they desired plaintiffs to furnish them with coal delivered to any part of the city, as directed, plaintiffs collecting the bills in the name of the company and being paid the difference due each month; also to deliver the company's coal

and to act as its delivery agents. Plaintiffs answered assenting to the arrangement. Under it, upon orders issued by the secretary and the treasurer, who were not directors of the company, plaintiffs delivered coal to divers persons, and the alleged indebtedness of the company was for a balance due upon the coal so delivered. It did not appear that the coal was delivered to stockholders or upon any contracts made by the company, or that the transactions were known to any of its directors or appeared upon any of its books. It did appear that they were not authorized by resolution of the board of directors and that they were unknown to a majority of them, and there was no competent evidence that the corporation received the proceeds of the coal. *Held*, that plaintiffs failed to establish a debt against the corporation and therefore that the action was not maintainable. *Alexander* v. *Cauldwell*. 480

—— *Where bond and mortgage of an attorney of one of the parties in a partition suit was deposited in good faith by the referee appointed to sell as part of a fund directed to be deposited with and invested by the county treasurer in trust, and the cestuis que trusts with full knowledge have for years received the income. Held that they could not repudiate the investment and impose it upon the referee.*

See Wiggins v. *Howard*. (*Mem.*) 613

UNDERTAKING.

1. Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (§ 338), containing among other things this provision, that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General Term. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the General Term, *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court. *Church* v. *Simmons*. 261

2. *It seems* that if after judgment of affirmance the defendant had continued in possession by permission of the plaintiff under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant. *Id.*

3. *It seems* also that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts. *Id.*

4. *It seems* also that the sureties in the first undertaking would be entitled to resort for their indemnity to the undertaking on the second appeal. *Id.*

USAGE.

A custom or usage in a business will not bind the parties to a contract unless it appearst hey had knowledge of its existence, or that it is so general that they must be presumed to have contracted with reference to it. *Harris* v. *Tumbridge*. 92

VENDOR AND PURCHASER.

1. A vendee, entitled to rescind a sale for fraud, must act promptly on discovery of the fraud, and restore or offer to restore the property. By dealing with it as owner after such discovery he deprives himself of this remedy. *Schiffer* v. *Dietz*. 300

2. Where fraud upon the part of the vendor is claimed on the sale of

real estate, a continuance in possession by the vendee after discovery of the fraud is evidence of an intent to abide by the contract. *Id.*

3. Defendant, in execution of a contract to convey certain premises to plaintiff by deed, with warranty free and clear from all incumbrances, executed a conveyance May 10, 1872. At the time of the execution of the contract and of the delivery of the deed, defendant was married but his marriage was kept secret; defendant then supposed it to be invalid. Plaintiff had no knowledge of it until the fall of 1873, and defendant knew that plaintiff believed him to be unmarried. In an action to rescind the sale and conveyance, *held*, that defendant's belief in the invalidity of the marriage did not justify his omission to disclose the fact to plaintiff, as if void, or if it could be annulled, the fact of the formal marriage would be a cloud on title; that, therefore, a finding of fraud was justified, and on the discovery thereof plaintiff was entitled to demand a rescission. *Id.*

4. Plaintiff retained possession up to the time of the trial in September, 1877, and leased the premises, receiving the rents. At the time plaintiff discovered the defect in his title, he was advised that a suit brought by defendant for a divorce was pending. Plaintiff thereafter paid interest on mortgages given by him on the sale on defendant's assurance that the title would be fixed before the next interest became due. He also conveyed undivided interests in the premises to parties who had become jointly interested in the purchase. In the divorce suit both parties were found guilty of adultery and the complaint was dismissed. In December, 1874, for the purpose of testing the right of defendant's wife to claim dower, the plaintiff contracted to sell a portion of the premises; the contractor refused to take title on the ground of the outstanding dower right; upon an agreed case the question was presented and submitted to the court, and it was finally determined that the judgment in the divorce suit did not bar the dower right. (64 N. Y. 47.) In April, 1876, the interests so conveyed by plaintiff were reconveyed to him, and he thereupon tendered to defendant a reconveyance demanding a return of the purchase-money; defendant in reply promised to perfect the title. Immediately thereupon plaintiff commenced this action. Defendant thereafter procured and tendered a deed executed by his wife releasing her dower in the premises. *Held*, that assuming that in consequence of defendant's promises to perfect the title, the right to rescind was held in abeyance, notwithstanding plaintiff's acts as owner, plaintiff was bound, before bringing suit, to fix a reasonable time for perfecting the title giving defendant notice; and as it appeared that there had been no change in the value of the property after the commencement of the action, the tender of title was in equity a good answer to the claim for rescission. *Id.*

VENUE.

1. As an action under the manufacturing act (§ 15, chap. 40, Laws of 1848), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (Code of Civil Proceedure, § 983) and must be tried in the county where the cause of action or some part thereof arose. *Veeder* v. *Baker*. 156

2. As the cause of action is solely the false report, it arises in the county where sai dreport was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. *Id.*

WAIVER.

Where, in the complaint and upon the trial of an action to recover

possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and, in any event, before the lien can be restored, the false claim of title must be abandoned, the title of the true owner conceded and the claim reduced to one of lien. *Hudson* v. *Swan*. 552

——*What is not waiver of breach of warranty in insurance policy. See Devens* v. *M. & T. Ins. Co.* 168

WASTE.

Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Procedure (§ 838), containing among other things this provision, that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General Term; W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the General Term, *held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court. *Church* v. *Simmons*. 261

WATER-COURSES.

1. The bed and banks of a fresh water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement. *Chenango Bridge Co.* v. *Paige*. 178

2. The legislature, except under the power of eminent domain, can interfere with such a river only for the purpose of regulating, preserving and protecting the public easement. *Id.*

3. Any person owning land on both sides of the river may, without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement. *Id.*

4. Such owner, however, cannot, without legislative authority, maintain a bridge or ferry for public use. *Id.*

5. Plaintiff was the owner of a mill operated by water power furnished by a creek. Defendant, who was a riparian owner above, under a claim of right, diverted the waters of the creek, conveying them by pipes to reservoirs whence its locomotives were supplied with water. The jury found, on sufficient evidence, that the water so diverted from the creek was sufficient "to perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he had sustained damage to a substantial amount. *Held*, that plaintiff was entitled to maintain an action to recover the damages sustained, and restrain such diversion *Garwood* v. *N. Y. C. & H. R. R. R. Co.* 400

WILLS.

1. A will executed in 1663 by one living in the now county of Albany, then a portion of the new New Netherlands directed that the "four first born children" of the testator "shall divide out of their father's property the sum of one thousand guilders, to be paid by them out of the proceeds of a certain farm * * * before any other

division takes place." *Held*, that this did not work an equitable conversion of the farm from real estate into personalty; that the distinction in the English law between the descent of real and the distribution of personal estate, upon which the doctrine of equitable conversion was founded, did not exist in the law which prevailed in New Netherlands at the time the will was made; also, that the effect of the provision was simply to create a charge upon the land in the hands of the devisees; and that assuming that by implication a power and duty was imposed on the "universal heirs," to sell, this power would not devolve upon an administrator with the will annexed. *Van Giessen* v. *Bridgford*. 348

2 The will of D. gave to his wife certain lands for life and directed that at her death the lands should be sold by the executor, and "the proceeds be equally divided between my daughters Sylvia, Harriet and Janetta, and the children and heirs of my sons Benjamin and Sumner and of my daughter Cynthia, share and share alike; and if either of the heirs above mentioned and intended shall die after the date of this will and before the said sums are paid them, the share of the one so dying without issue shall be equally divided among the other heirs above named." The testator died leaving his wife and the six children named surviving. Harriet and Janetta both died, leaving no children. Benjamin died, leaving a son and grandson, and Sumner died leaving seven children surviving. Afterward the widow died, and thereafter Cynthia died, without issue. In an action to obtain a construction of the will *held*, that the will intended a conversion of the land into money; the actual conversion, however, not to take place until the termination of the life estate; and by the provision the land was equitably converted into money from the time the sale was directed to be made; that no portion of the remainder vested at the death of the testator but only upon the death of the widow; that Harriet and Janetta having died before that time, and Cynthia thereafter without issue, it left the proceeds to be divided between Sylvia, the children of Sumner, and the child and grandchild of Benjamin; such children and grandchild taking *per stirpes*, not *per capita*. *Vincent* v. *Newhouse*. 505

3. At the time of the execution of the will of F. he had seven adult childrenl iving, the issue of a former marriage, and one infant daughter, the issue of a second marriage. By his will he devised to each of two of his adult children certain real estate, with this direction as to each: "That on a final division and settlement" of his estate, the property so devised "be taken into account as a part" of the share of the devisee in the testator's estate, "and for that purpose be valued at $10,000, but without interest or any charge for the use thereof." The will then declared that he had advanced to another adult child moneys equivalent to said devises, and directed that the same be charged to said child as an advance on "final settlement and division" on account of his share without interest. The executors were directed to pay to each of the four other adult children $10,000 as an equivalent for the provision made for the three, "the same to be charged to them respectively, but without interest, on a final settlement * * * as an advance on account of their respective shares." The executors were directed to invest $25,000 for the benefit of his wife and infant daughter, on the death or remarriage of his widow the income to be payable to the daughter during life, and the principal, upon her death, to her issue. The testator then declared that no gifts he might thereafter make to his children should be charged to their account on final settlement, unless he should have uncanceled, on his decease, some written evidence thereof signed by them. The executors were directed to divide the residuary estate, "share and

share alike," among his children, excepting one, and any children born to the testator after the date of his will; each of the children named who should survive the testator to "have the use and benefit of one of said equal shares for life," and at his or her decease the principal to go to his or her issue, if any; if not, to his or her next of kin, "according to law." After the execution of the will, and before the testator's death, another child was born, and all of said children were living at the time of his death. In an action to obtain a construction of the will, *held*, that the infant children were entitled to share equally with the adults in the whole estate; and that the said specific devises, bequests and advances should be charged to the beneficiaries respectively, and taken into account as part of his or her share on division of the residuary estate. *Williams* v. *Freeman*. 561

4. Also, *held*, that oral testimony, or writings of the testator not attested as a will showing a contrary intent, being in direct contradiction of the plain terms of the will, were incompetent as evidence and ineffectual to change those terms. *Id.*

5. The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will. *Id.*

6. By a codicil the testator reduced the valuation of one of the parcels of real estate so devised to $8,000, and directed the balance of $2,000 to be paid to the devisee to make her equal with the others. It gave the whole income of the $25,000 to his widow, and directed that upon her death or remarriage it should revert to the estate, and directed that upon the final division the two infant children, and any other children who might thereafter be born, should be included and share equally with those named in the residuary clause. *Held*, that the codicil did not change or affect the provision of the will as to the distributive shares on final division, or that giving to each child a life estate only in the remainder. *Id.*

7. The failure of recollection of the subscribing witnesses to a will, as to what occurred at the time of signing, will not defeat the probate thereof if the attestation clause and the surrounding circumstances satisfactorily establish its execution. *Rugg* v. *Rugg*. 592

8. An executor of a will is a competent witness to prove its due execution, although not a subscribing witness. *Id.*

WITNESSES.

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